DOCKET

No. 13-1433 *** CAPITAL CASE***

Title: Kevan Brumfield, Petitioner
v.
Burl Cain, Warden

Docketed: June 2, 2014

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (12-30256)

Decision Date: February 28, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
May 29 2014	Petition for a writ of certioran filed. (Response due July 2, 2014)
Jul 2 2014	Order extending time to file response to petition to and including July 9, 2014.
Jul 3 2014	Brief of respondent Burl Cain, Warden in opposition filed.
Jul 22 2014	Reply of petitioner Kevan Brumfield filed.
Jul 23 2014	DISTRIBUTED for Conference of September 29, 2014.
Sep 30 2014	Record Requested .
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Nov 17 2014	DISTRIBUTED for Conference of November 25, 2014.
Dec 1 2014	DISTRIBUTED for Conference of December 5, 2014.
Dec 5 2014	Petition GRANTED.
Jan 20 2015	Joint appendix filed. (Statement of costs filed.)
Jan 20 2015	Brief of petitioner Kevan Brumfield filed.
Jan 27 2015	Brief amici curiae of Chief Justice Pascal F. Calogero, Jr., et al. filed.
Feb 2 2015	SET FOR ARGUMENT ON Monday, March 30, 2015
Feb 12 2015	CIRCULATED
Feb 19 2015	Brief of respondent Burl Cain, Warden filed. (Distributed)
Mar 17 2015	Reply of petitioner Kevan Brumfield filed. (Distributed)
Mar 30 2015	Argued. For petitioner: Michael B. DeSanctis, Washington, D.C. For respondent: Premila Bums, Baton Rouge, La.
Jun 18 2015	Judgment VACATED and case REMANDED. Sotomayor, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Kagan, JJ., joined. Thomas, J.,

	filed a dissenting opinion, in all but Part I-C of which Roberts, C. J., and Scalia and Alito, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., joined.
Jul 20 2015	JUDGMENT ISSUED.
Jul 21 2015	Records from U.S.D.C. Middle Dist. of Louisiana has been returned.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAY 29 2014
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13-1433

No. ____

IN THE
Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2).

II. Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his mental retardation has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevan Brumfield respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a) is reported at 744 F.3d 918. The district court's opinion (Pet. App. 17a) is reported at 854 F. Supp. 2d 366. Its order adopting the Magistrate Judge's Report and Recommendation (Pet. App. 99a) is unreported. The Magistrate Judge's Report and Recommendation (Pet. App. 101a) is unreported. The Louisiana Supreme Court's opinion rejecting Petitioner's application for supervisory and/or remedial writs (Pet. App. 168a) is reported at 885 So. 2d 580. The state trial court's oral denial of Petitioner's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (Pet. App. 170a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on February 28, 2014, and denied a timely petition for rehearing on that same date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

This case presents the extraordinary circumstance in which Petitioner faces imminent execution, despite the fact that the sole court to conduct a hearing on his *Atkins* claim concluded that he was in fact mentally retarded.

Petitioner was sentenced to death before this Court's decision in *Atkins v. Virginia*, 536 U.S. 304

(2002). Promptly after *Atkins* was decided, Petitioner presented his mental retardation claim to the state courts. His request was denied without a hearing, however, on the ground that Petitioner's mental retardation was not apparent from his pre-*Atkins* trial transcripts – at which Petitioner did not even attempt to, and had no reason to, establish that he was mentally retarded.

Petitioner then sought habeas relief. The federal district court recognized the grave error in denying Petitioner a hearing on his *Atkins* claim, holding that the state court's conclusion was an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), because the state court mistakenly – and unreasonably – considered the record from Petitioner's pre-*Atkins* penalty phase as determinative of Petitioner's mental retardation claim under *Atkins*. The court conducted a seven-day trial, at which several experts testified regarding Petitioner's severe mental deficiencies. Based on the evidence presented, the court concluded that Petitioner was mentally retarded.

In a decision that contravenes this Court's jurisprudence and creates a split with both the Seventh and Eleventh Circuits, the Fifth Circuit reversed. Without engaging with the district court's reasoning or acknowledging any of the relevant case law, the Fifth Circuit concluded that the state court acted reasonably in denying Petitioner a hearing. As a result of this decision, the compelling evidence presented to the district court will be ignored, and a person who was found to be mentally retarded will be executed.

STATEMENT OF THE CASE

A. Petitioner's Capital Trial

In 1995, Petitioner was convicted of first-degree murder and sentenced to death in Louisiana state court.

At the penalty phase of Petitioner's trial, defense counsel's mitigation presentation focused on Petitioner's difficult and abusive childhood. Defense counsel did not attempt to argue that Petitioner should be spared the death penalty because he was mentally retarded.[1,2] Defense counsel did call a clinical neuropsychologist (Dr. John Bolter) and a social worker (Dr. Cecile Guin). Neither Dr. Bolter nor Dr. Guin presented any expert opinions regarding whether Petitioner was or was not mentally retarded. Rather,

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[1] As discussed in more detail below, this is because defense counsel had no reason to argue mental retardation, particularly given that the trial took place before *Atkins*, and in fact had strategic incentive *not* to present evidence of mental retardation. During the sentencing hearing, which spanned 184 pages of transcript, only once did anyone use any variation of the phrase "mental retardation": the state's attorney mentioned in his closing that Petitioner "is not someone who is retarded."

[2] This Court has recently observed that medical experts have approved and adopted the term "intellectual disability" to describe the same phenomenon that was previously been described as "mental retardation." *Hall v. Florida*, No. 12-10882, ___ S. Ct. __, 2014 WL 2178332, at *3 (U.S. May 27, 2014). Because the term "mental retardation" has been used by the lower courts and the parties throughout this proceeding, however, that term has been used in this brief.

Dr. Bolter concluded that, as a child, Petitioner appeared to have a conduct disorder, educational problems, and attention deficit disorder, and, as an adult, had more of an antisocial or sociopathic personality, continued attention difficulty, and a rapid rate of forgetting. *See* Pet. App. 122a-23a. Dr. Guin concluded that Brumfield's childhood was "very chaotic, [and] very complicated" and he had a non-supportive environment at home. *See* Pet. App. 124a.

In reaching these conclusions, Dr. Bolter and Dr. Guin made some ancillary statements related to Petitioner's intelligence. For instance, Dr. Bolster testified that he gave Petitioner the "Webster Adult Intelligence Test" which returned an IQ score of 75, without explaining any details of how the test was conducted or controlled. *See* Pet. App. 123a. He also mentioned a "screening test" administered by another doctor that "rated [Petitioner's] intelligence just a little higher." Dr. Guin testified that Petitioner's extremely low weight at birth put him at risk of neurological problems, and that Petitioner began having difficulties at school in the third grade, which led to his placement in many different schools and a mental health facility. *See* Pet. App. 124a.

The trial judge instructed the jury to consider whether the mitigating circumstances outweighed the aggravating circumstances of Petitioner's crime. As mentioned above, the jury returned with a capital sentence.

B. State Post-Conviction Petition

On March 16, 2000, Petitioner sought post-conviction relief in state court. In his petition for relief and again in a subsequent motion, Petitioner sought funding for various experts to develop his claims.

Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Petitioner amended his state petition, asserting that his execution would violate the Eighth Amendment because he was mentally retarded. Petitioner also reiterated his request for funding to develop his claims.

At a motions hearing, the state court determined that Petitioner was not entitled to a hearing and denied his *Atkins* claim. The court concluded that the ancillary, passing statements of Petitioner's expert witnesses at the penalty phase of his trial, which pre-dated *Atkins* and at which Petitioner did not even raise the issue of mental retardation, established definitively that Petitioner had not "demonstrated impairment based on the record in adaptive skills." Pet. App. 171a. Because Petitioner "hadn't carried his burden placing the claim of mental retardation at issue" at the penalty phase, he was "not entitled to" a hearing on post-conviction. Pet. App. 171a-72a. The court's explanation, in full, was as follows:

> I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and

> based on those, since this issue – there was a lot of testimony by all on those in Dr. Jordan's report.
>
> Dr. Bolter in particular found he had an IQ of over – or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Pet. App. 171a-72a. The court ultimately denied Petitioner's petition in its entirety without acknowledging or ruling on any of his requests for funding.

The Louisiana Supreme Court denied Petitioner's application for a writ to review the state trial court's denial of his petition without explanation. *See Brumfield v. State*, 885 So. 2d 580 (La. 2004).

C. Federal Habeas Petition

On November 4, 2004, Petitioner filed a federal petition for a writ of habeas corpus. Petitioner argued, among other things, that the state court's denial of his *Atkins* claim and its refusal to provide him with funding violated 28 U.S.C. § 2254(d)(1) and (d)(2).

The district court agreed. Consistent with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the court began by analyzing, based solely on the state court record, whether the state court's ruling was based on an unreasonable determination of the facts under AEDPA. The Court concluded that it was. It held that the state court, in denying Petitioner an *Atkins* hearing, based its decision on an unreasonable determination of facts by considering the record from Petitioner's pre-*Atkins* penalty phase hearing to be determinative of the mental retardation issue. Pet. App. 36a-48a. It also held that the state court acted contrary to this Court's decisions in *Ford v. Wainright* and *Atkins* by refusing to provide Petitioner with funding despite the fact that he had no other means to develop his claim. Pet. App. 30a-36a, 48a. Having surpassed that threshold determination, the court considered the merits of Petitioner's *Atkins* claim. Based on a seven-day trial and testimony from seven experts on psychology and mental retardation, the court found that Petitioner was, in fact, mentally retarded under Louisiana law. Pet. App. 98a.

The district court explained in detail the evidence from the evidentiary hearing that supported its finding. With respect to Petitioner's intellectual functioning, the State's psychologist concluded that Petitioner's IQ was 70 and Petitioner's psychologist came up with scores of 70 and 72. Pet. App. 60a-61a. Every expert who testified, including the State's experts, agreed that these IQ scores demonstrated intellectual functioning consistent with mental retardation, as that term is defined by Louisiana law. Pet. App. 62a. In fact, the

State did not even argue that Petitioner failed to meet that aspect of the test for mental retardation. Pet. App. 62a.

Experts also provided testimony regarding Petitioner's deficiency in adaptive skills. Substantial testimony indicated that Petitioner suffers from severe limitations in his ability to read and write. Due to a limitation in motor skills, for instance, Petitioner is unable to write freehand. Rather, he must use a piece of cardboard to write in a straight line and takes "an inordinate amount of time to write a simple, one-page letter." Pet. App. 75a. Furthermore, experts testified that Petitioner has the ability to read at only a fourth grade level, and that his adult reading habits are consistent with someone who is mental retarded. Pet. App. 76a.

Experts also testified regarding Petitioner's "dismal record of academic accomplishments in the classroom," stating that his "[s]chool testing records show lack of competence in virtually every area." Pet. App. 76a. Petitioner "reached a plateau somewhere between the fourth and sixth grade," which is consistent with someone who is mentally retarded. Pet. App. 76a. The testimony also demonstrated that from ages 11 to 16 alone, Petitioner was in special education and placed in at least 10 different schools. In total, Petitioner attended 14-15 schools before he dropped out at age 16. Pet. App. 76a-77a.

Experts further testified that etiological factors signaled that Petitioner is mentally retarded. They

testified that Petitioner's mother had psychiatric problems during her prenatal period and took psychotropic medication during pregnancy. Pet. App. 94a. Furthermore, Petitioner suffered from fetal stress and was only three-and-a-half pounds at birth. Pet. App. 94a. Experts also testified that several of Petitioner's family members also suffer from mental retardation, including at least one cousin with severe to moderate retardation. Pet. App. 94a.

Based on all of the evidence presented, the district court found Petitioner to be mentally retarded and granted his petition for a writ of habeas corpus.

On appeal before the Fifth Circuit, the primary focus of Petitioner's briefing was that the district court's decision to hold an evidentiary hearing was correct because the state court's decision violated § 2254(d). Petitioner specifically argued that "[t]he district court correctly found that the state court's decision 'suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceedings in violation of § 2254(d)(2)'" because "[t]he state court's reliance on penalty phase evidence to establish adaptive skills deficits was unreasonable." Brief of Petitioner-Appellee at 50-51, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713226. Petitioner further argued that "[w]hen a Louisiana state court relies on record evidence from a pre-Atkins sentencing that, on its own terms, does not even relate to mental retardation, it cannot be deemed to have made a reasonable factual determination as a matter of law." *Id.* at 51-52.

The State, in response, *never* disputed the district court's § 2254(d)(2) analysis. Rather, the State asserted (incorrectly) that under *Pinholster*, 131 S. Ct. 1388, a district court is necessarily barred from holding an evidentiary hearing whenever the state court has adjudicated the petitioner's claim on the merits. According to the State, "where, as here, the state district court issued a ruling on the claim's merits" it necessarily followed that "[n]o federal court evidentiary hearing was appropriate." Brief of Respondent-Appellant at 15, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713227. The State thus found no occasion to address § 2254(d)(1) or (2).

The Fifth Circuit nonetheless reversed, holding that the state court had not violated § 2254(d)(1) or (d)(2). In its opinion, the Fifth Circuit expressly acknowledged that the district court had granted the petition based on the state court's treatment of penalty phase evidence as determinative of Petitioner's mental retardation claim. *See* Pet. App. 14a (stating that the district court "chided the state court for relying on evidence presented for mitigation purposes"). Inexplicably, however, the Fifth Circuit reversed the district court without even considering that dispositive analysis.[3] Instead, the Fifth Circuit held in conclusory

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[3] The Fifth Circuit's failure to confront the district court's reasoning may have been because, as described above, the State itself never contested the district court's § 2254(d)(2) analysis, or because the Fifth Circuit initially held that Petitioner had waived any argument under § 2254(d)(2), *see Brumfield v. Cain*, 740 F.3d 946 (5th Cir. 2014), *withdrawn and superseded by* 744 F.3d 918 (Pet. App. 1a) – a conclusion that was inexplicable in the face of

fashion that "the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing" because "the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation." Pet. App. 14a. In doing so, the Fifth Circuit itself turned to the record at Petitioner's pre-*Atkins* penalty phase proceeding, explaining that

> no one testified that Brumfield was mentally retarded. Indeed, the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality. There was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships.

Pet. App. at 15a.

Petitioner's explicit briefing on § 2254(d)(2). On rehearing, the Fifth Circuit amended its original opinion to make clear that Petitioner had not waived the argument, but did not further supplement its analysis on the § 2254(d)(2) issue. *See* Pet. App. 14a-15a.

REASONS FOR GRANTING THE PETITION

I. By Holding that the State Court's Rejection of Petitioner's *Atkins* Claim was Not Based on an Unreasonable Determination of the Facts, the Fifth Circuit Contravened this Court's Jurisprudence and Created a Split Among Circuits.

In *Atkins*, the Supreme Court held that inmates who are mentally retarded cannot be executed. In doing so, the Court made clear that mental retardation for purposes of mitigation at the penalty phase and mental retardation for *Atkins* purposes are distinct inquiries that should not be conflated. Since then, however, numerous state courts have resolved *Atkins* claims solely by reviewing the record from an inmate's penalty phase trial. In turn, an irreconcilable conflict among the circuits has emerged regarding the reasonableness under AEDPA of a state court's reliance on the penalty phase record to resolve a claim of mental retardation under *Atkins*. whether state court decisions treating a penalty phase record as determinative of an *Atkins* claim may be considered reasonable under AEDPA. This case presents a strong vehicle to resolve that conflict.

1. In justifying the need for a categorical rule making offenders ineligible for the death penalty in *Atkins*, this Court specifically recognized that the ability to introduce evidence related to mental retardation in penalty phase proceedings is insufficient

to provide the requisite Constitutional protection. The Court explained:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21 (footnote omitted); *see also Hall v. Florida*, No. 12-10882, __ S. Ct. __, 2014 WL 2178332, at *6 (U.S. May 27, 2014) ("A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel." (quoting *Atkins*, 536 U.S. at 320-21)).

Atkins also specifically recognized that defendants may be reluctant to present evidence of mental retardation at the penalty phase of their proceedings because "reliance on mental retardation as a mitigating

factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321. For these reasons – even though the state court in *Atkins* had already considered evidence of mental retardation as a mitigating factor at the penalty phase – this Court held that a hearing as to mental retardation was required under the Eighth Amendment. *Id.* at 308-09.

More recently, the Court in *Bobby v. Bies*, 556 U.S. 825 (2009), confirmed this understanding of *Atkins*, explaining that "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues." *Id.* at 829. There, the Court again observed that mental retardation evidence was a "two-edged sword" when offered at penalty phase proceedings – so much so that "prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation." *Id.* at 836; *see also Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010) (observing that counsel commonly and reasonably forgo presenting evidence of mental deficiency at the penalty phase because such evidence often has the potential to "undercut" other mitigating evidence or lead to even more damaging rebuttal testimony).

In light of *Atkins* and *Bies*, two Courts of Appeals have held that death row inmates are entitled to federal habeas relief when a state court denies an *Atkins* claim based solely on the penalty phase record, without fulfilling its independent constitutional obligation to give the inmate a hearing on mental retardation. First,

in *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013), the Eleventh Circuit held that a state court violates § 2254(d)(2) when it concludes that a petitioner is not mentally retarded under *Atkins* based on a "pre-*Atkins* record [that] was inadequate to reasonably support the state court's findings." *Id.* at 1318. In *Burgess*, as here, the petitioner was sentenced to death prior to this Court's decision in *Atkins*. In his state post-conviction proceedings, which took place after *Atkins* was decided, the petitioner asserted a claim of mental retardation. However, the claim was rejected based on a finding that the petitioner had an IQ between 70 and 80, and that petitioner had "failed to demonstrate significant deficits in adaptive behavior." The state court relied on evidence that was presented in mitigation at the penalty phase of the trial, including the fact that the petitioner had attended school through the ninth grade, had maintained some employment, and was a caring child. *Id.* at 1316-17.

On federal habeas, the Eleventh Circuit held that the state court based its decision on an unreasonable determination of the facts by relying exclusively on the petitioner's penalty phase transcript to find that he lacked adaptive deficits. The court explained that that evidence "was presented in an entirely different context and without the benefit of any explanation of how it would or would not be consistent with mental retardation, and therefore does not indicate anything substantive about Burgess's adaptive abilities as that term is used clinically." *Id.* at 1316. Relying on this Court's reasoning in *Atkins* and *Bies*, the Eleventh

Circuit further explained that "evidence presented pre-*Atkins*, may not in every case be conducive to an *Atkins* inquiry and may not enable a court to make reasonable factual determinations relating to mental retardation for the purposes of the Eighth Amendment." *Id.* at 1317. Although the court acknowledged that a pre-*Atkins* record could support a finding that the petitioner is not mentally retarded where it contained "extensive evidence relating to [the petitioner's] mental health, including the testimony of numerous experts directly addressing whether [the petitioner] was mentally retarded," such a record could not do so where it "was inadequate to reasonably support the state court's findings." *Id.* at 1318.

Notably, with respect to the petitioner's intellectual functioning, the court held that the state court could not simply rely on the testimony of an expert who "'estimated' Burgess's IQ to fall in the 70 to 80 range" and a record "indicat[ing] that Burgess had an IQ of 73." *Id.* at 1316. The court explained: "there was no explanation of how the score was obtained, of who had obtained and recorded the score, or why." *Id.*

Here, the record from Petitioner's penalty phase trial was even weaker than in *Burgess*. The only testimony potentially related to Petitioner's adaptive skills was that he had educational problems, attention deficits, and a low weight at birth that put him at risk of neurological problems – by no means the sort of "extensive evidence relating to his mental health, including the testimony of numerous experts directly addressing whether [Petitioner] was mentally

retarded" that, according to the Eleventh Circuit, might permit a state court to reasonably rely on a penalty phase record. *Id.* at 1318. In fact, unlike the evidence in *Burgess* regarding the petitioner's academic success and successful employment, the evidence here, if anything, indicates that Petitioner actually *had* adaptive deficiencies. Furthermore, as in *Burgess*, here the state court relied on a single IQ score and vague testimony that another doctor "rated [Petitioner's] intelligence just a little higher," without any explanation of specifically how or why those scores were obtained. *See* Pet. App. 123a, 171a.

The Seventh Circuit has likewise held that a state court acts unreasonably by failing to appreciate the distinction between mental retardation evidence at the penalty phase and mental retardation for the purposes of *Atkins*. Adding an additional layer to the split among the circuits, however, the Seventh Circuit has held that such an error is "contrary to, or involved an unreasonable application of" this Court's precedent, in violation of § 2254(d)(1). In *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), the petitioner was convicted and sentenced to death prior to *Atkins*. *Id.* at 659. In sentencing the petitioner to death, the trial court concluded that "'the possibility of the mitigating circumstance of [the petitioner's] mental retardation' did not outweigh the aggravating circumstance of his crime." *Id.* at 660.

After this Court's decision in *Atkins*, the petitioner sought post-conviction relief in state court on the basis that he was mentally retarded. The state court

rejected the claim on the basis that he had failed to establish mental retardation at his penalty phase. It reasoned that, although

> the issue of [the petitioner's] mental capacity was presented to the trial court in the context of whether [his] mental retardation was a mitigating circumstance sufficient to outweigh the aggravating circumstance . . . the factual inquiry required by this balancing test is the same as the one required by *Atkins*: "is the person mentally retarded?"

Id. at 662 (citation omitted).

The Seventh Circuit held that this decision "[was] contrary to the Supreme Court's holding in *Atkins*, which recognized that there is a difference between using mental retardation as a mitigating factor and categorically excluding mentally retarded persons from the death penalty altogether." *Id.* at 662. The court observed that the sentencing judge "engaged in a substantively different inquiry from that mandated by *Atkins*." *Id.* at 663. Namely, "the trial court did not determine whether Allen is mentally retarded under Indiana's test for mental retardation," which "would have required consideration of whether Allen 'manifest[ed] ... significantly subaverage intellectual functioning' and 'substantial impairment of adaptive behavior' before becoming twenty-two years of age." *Id.* (citation omitted). Rather, the sentencing judge determined "mental retardation was not sufficiently mitigating to overcome an aggravating circumstance" –

"a balancing test, not a binary inquiry." *Id.* The Seventh Circuit concluded that in light of "the entirely different standard utilized by the trial court in reaching its conclusion," the state court's determination that the petitioner was not mentally retarded under *Atkins* was "objectively unreasonable." *Id.* at 664.

The circumstances of this case are materially indistinguishable from *Allen*. Here, as there, the state post-conviction court conflated the trier of fact's "pre-*Atkins* determination that [the petitioner's] mental retardation was not sufficiently mitigating to overcome an aggravating circumstance" with the mental retardation determination mandated by *Atkins*. *Id.* at 663; *see* Pet. App. 171a-72a (rejecting Petitioner's *Atkins* claim on the basis that he "hadn't carried his burden [of] placing the claim of mental retardation at issue" during sentencing). And it did so even though the trier of fact at sentencing did not actually determine, or even have the facts to consider, whether Petitioner was mentally retarded.

Petitioner's penalty phase record also contained substantially less evidence related to mental retardation than in *Allen*. In *Allen*, the penalty phase record contained affidavits from experts opining as to whether the petitioner was mentally retarded. It also contained affidavits from experts regarding the petitioner's adaptive skills, including his ability to process language as a child and understand the consequences of his conduct; and evidence of at least three IQ tests taken throughout the petitioner's life, indicating scores as high as 104. *Allen*, 558 F.3d at 661-

62. Here, aside from the single IQ test score of 75, there was essentially nothing in the state court record specifically directed at Petitioner's intellectual functioning.

There is thus a split in authority among the circuits as to whether a state court acts unreasonably when it treats the evidence presented at a petitioner's pre-*Atkins* penalty phase hearing as dispositive of his *Atkins* claim. If Petitioner were sentenced to death in Alabama, Florida, Georgia, Illinois, Indiana or Wisconsin, he would be constitutionally exempt from the death penalty. Because he was sentenced within the Fifth Circuit, however, his execution remains imminent.

2. In addition to creating a split with these other circuits, the Fifth Circuit's decision was simply wrong. Under 28 U.S.C. § 2254(d)(2), a federal court may grant a state prisoner habeas relief if his claim was adjudicated on the merits in state court and "resulted in a decision . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Wood*, 558 U.S. at 293. Here, the state court's decision was based on an unreasonable determination of the facts because it based its findings on a factual record that was entirely irrelevant to the determination of whether Petitioner was mentally retarded.

It was error to determine that Petitioner was not mentally retarded simply because he "hadn't carried his burden placing the claim of mental retardation at issue"

or had not demonstrated a deficiency in adaptive skills at the penalty phase of his trial. Pet. App. 171a-72a. There was no reason for Petitioner to try to meet the clinical standard of mental retardation at his penalty phase, which involves a completely different factual determination.

This is especially true given that Petitioner had a strategic incentive *not* to use his limited resources at the penalty phase to develop evidence of mental retardation. *See Atkins*, 536 U.S. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword"); *Bies*, 556 U.S. at 829; *Wood*, 558 U.S. at 303 n.3. Indeed, defense counsel, at the penalty phase proceeding never sought to develop a record of mental retardation. Specifically, defense counsel did not ask Dr. Bolter to elaborate on his testimony regarding Petitioner's IQ or on Dr. Guin to expand on her testimony that Petitioner may have been susceptible to neurological problems due to his birth weight and, to the contrary, quickly changed the subject.

Furthermore, the state court's reliance on the penalty phase record was particularly unreasonable given that Petitioner was sentenced before *Atkins* was decided and before Louisiana had first articulated its standard for mental retardation in *State v. Williams*, 831 So. 2d 835 (La. 2002). In *Williams* the Louisiana Supreme Court held that mental retardation has "three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological

disorder in the developmental stage."[4] It strains sensibility to assume that Petitioner's penalty phase determined whether Petitioner was mentally retarded, according to a fact-intensive, clinical standard that had not yet been articulated. *See State v. Dunn*, 41 So. 3d 454, 469 (La. 2010) (explaining that Louisiana's standard for mental retardation "may require a fact finder to make exceedingly fine distinctions between those persons who are exempt from capital punishment and those who are not because mildly mentally retarded persons are capable of working and living on their own just as persons of borderline intelligence"); *State v. Williams*, 22 So. 3d 867, 887 (La. 2009) ("the determination of whether a defendant is mentally retarded is inherently an intensively factual inquiry").[5] As the district court observed, had Petitioner "had the benefit of the *Atkins* decision" at the time of his penalty phase, he "may have altered the strategic choices of the defense in deciding not to present mitigating evidence that [he] was mentally retarded." Pet. App 40a.

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[4] Louisiana subsequently adopted a statutory definition of mental retardation, which is, in relevant part, the same as the standard articulated in *Williams*. *See* La. C. Crim. P. art. 905.5.1(H).

[5] *Cf. also Bies*, 556 U.S. at 834-35 (rejecting the argument that state courts had determined the issue of mental retardation on direct appeal where "it [was] not clear from the spare statements of the [courts] that the issue of . . . mental retardation under [Ohio's] test was actually determined at trial or during Bies' direct appeal" because "[n]o court found, for example, that Bies suffered 'significant limitations in two or more adaptive skills'" and the issue had not been conceded under "*Atkins* and [Ohio's test], which had not then been decided").

The state court record in this case confirms that no evidence was presented at the penalty phase regarding whether Petitioner was mentally retarded. *See* Pet. App. 44a ("even assuming for the sake of argument that it was not clear legal error to extrapolate *Atkins* evidence on mental retardation from pre-*Atkins* mitigating evidence . . . the actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts use to assess mental retardation"). No expert at the penalty phase opined whether Petitioner was mentally retarded. As the district court noted, much of the evidence that would have been necessary to assess Petitioner's adaptive skills – "including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naive, and (4) whether he has any practical skills" – was "simply lacking in discussion or even mention." Pet. App. 45a.

Nor does the evidence on which the state court purported to rely support a finding of mental retardation. The ancillary evidence that the court cited to in finding that Petitioner had not demonstrated an impairment in adaptive skills – Dr. Bolter's testimony that Petitioner may have had "an anti-social personality or sociopath [disorder]" and "no conscience" – was simply irrelevant to his adaptive functioning. Furthermore, Dr. Bolter's testimony that Petitioner received an IQ score of 75 (without any details about the test he employed or how he administered it) cannot itself be dispositive of mental retardation. Louisiana itself recognizes that an IQ score of 75 is consistent

with mental retardation and thus requires consideration of adaptive skills. *See Dunn*, 41 So. 3d at 470 ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired."). Indeed, as discussed further below, this Court very recently held that the Eighth Amendment requires states to consider adaptive functioning, "includ[ing] evidence of past performance, environment, and upbringing" when an individual's IQ is 75 or below. *Hall*, 2014 WL 2178332, at *9, 14-15; *id.* at *22 (Alito, J., dissenting) ("as I understand the Court's opinion, it . . . holds that when IQ tests reveal an IQ between 71 and 75, defendants must be allowed to present evidence of deficits in adaptive behavior"). It was unreasonable for the state court to determine that Petitioner had not "demonstrated impairment based on the record in adaptive skills," based on evidence irrelevant to that inquiry and effectively determine that Petitioner was not mentally retarded based on a single, unexplained IQ score that is in fact consistent with mental retardation. Pet. App. 171a-72a.

3. This case is a uniquely strong candidate for resolving this critical question. In most cases, when a habeas petitioner contends that the state court unfairly denied him an *Atkins* hearing, the State will simply say that any error is harmless because the petitioner cannot point to any evidence that he did not raise in state court, or because the prisoner is not actually mentally retarded. But this case arrives at the Court

with an unusual procedural history: The District court actually conducted the *Atkins* hearing, took additional evidence, and found the defendant to be mentally retarded. The Fifth Circuit then reversed on the ground that the state court reasonably denied Petitioner's *Atkins* claim, despite treating the penalty phase record as determinative, without resolving whether Petitioner was mentally retarded. The case thus gives the Court the opportunity to correct the Fifth Circuit's erroneous application of AEDPA without the complication of an alternative ground that might prevent the Court from reaching the disputed issue.

II. The Fifth Circuit Erred by Concluding That the State Habeas Court's Decisions Did Not Unreasonably Apply This Court's Holdings in *Atkins*, *Ford*, and *Ake*.

In addition to its fundamental misunderstanding of § 2254(d)(2), the Fifth Circuit committed a separate but related error in its application of § 2254(d)(1). The Fifth Circuit held that the state court could reasonably deny Petitioner funding even where doing so effectively deprived him of the ability to make out his *Atkins* claim. Pet. App. 12a-13a. It erred in doing so.

Under AEDPA, a decision by a state court is not entitled to deference if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established federal law "if the

state court arrives at a conclusion opposite to that reached by [this Court] on a question of law." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [this Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard'" on his claim that he is ineligible for the death penalty due to mental infirmity. *Id.* at 424 (Powell, J., concurring) (quotation marks omitted) (alteration in original).[6] In that case, Florida had determined the defendant's mental status "solely on the basis of the examinations performed by state-appointed psychiatrists." *Id.* This method was found to violate due process because "[s]uch a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Id.* As such, *Ford*'s holding is that a defendant facing execution must be permitted a

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[6] Justice Powell's concurring opinion contains the narrowest holding agreed upon by a majority of the Justices and therefore has long been recognized as the holding of the Court in *Ford*. *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) ("Justice Powell's opinion constitutes 'clearly established' law for purposes of § 2254 . . . ."); *Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989) (recognizing that the reasoning in Justice Powell's concurrence carried five votes).

meaningful opportunity to be heard and to offer evidence of his mental condition in his own defense.[7]

While *Ford* dealt with the issue of insanity, this Court made clear in *Atkins* that the constitutional requirements laid out in *Ford* also apply to the determination of mental retardation. *See Atkins*, 536 U.S. at 317. Under *Ford* and *Atkins*, Petitioner was entitled to a meaningful opportunity to be heard and to submit evidence on his claims of mental retardation.

However, due to Petitioner's indigence, he was unable to even *attempt* to develop such evidence. He repeatedly requested funding to develop his claims, but these requests were ignored by the state habeas court. Pet. App. 19a-20a.

Where a prisoner is indigent, he cannot afford to obtain mental testing that would be relevant to making out a prima facie case under *Atkins*.[8] And as discussed above, Petitioner could not merely rely on evidence from his sentencing hearing to create a prima facie case under *Atkins*, because the question of whether he was mentally retarded was simply not a discrete issue

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[7] In *Panetti*, this Court again held that the "basic requirements [of due process in *Ford* competency hearings] include an opportunity to submit evidence and argument from the prisoner's counsel." 551 U.S. at 950 (internal quotation marks omitted).

[8] As then-Chief-Judge Cardozo noted, "a defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929) (Cardozo, C.J.).

during his sentencing hearing. In fact, as *Atkins* itself noted, Petitioner actually had reason *not* to pursue evidence of mental retardation at the penalty phase of his trial. *Atkins*, 536 U.S. at 320-21.

Where a prisoner is indigent (and he thus cannot afford testing) and where mental retardation was not a discrete issue at the penalty phase (and he therefore is unlikely to have developed extensive pre-existing evidence of retardation), the refusal by a state court to give any funding whatsoever amounts to a flat-out denial of the opportunity to be heard. As the district court observed in this case, these prisoners are subjected to a cruel Catch-22: "without expert funding, no prima facie showing is likely possible, yet without a prima facie showing, no expert funding is forthcoming." Pet. App. 35a. By denying Petitioner any opportunity to collect and present additional evidence related to his mental condition, the state habeas court's decision "invites arbitrariness and error by preventing the affected parties from offering . . . evidence" in support of mental retardation. *Ford*, 477 U.S. at 424 (Powell, J., concurring).

The Fifth Circuit compounded this error by looking only to whether there is a "Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case," Pet. App. 12a, rather than considering the necessary implications of *Ford* and *Atkins* as applied to Petitioner's case. By rigidly looking for a Supreme Court case with this exact holding, the Fifth Circuit failed to follow the example set by its sister circuits in

the context of *Atkins*. *See White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (§ 2254(d)(1) does not "require[] an identical factual pattern before a legal rule must be applied" (citation omitted) (internal quotation marks omitted)). In *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), for example, the Tenth Circuit concluded that there is a clearly established right to counsel during an *Atkins* hearing, even though "the Supreme Court has never said that defendants have a right to counsel in *Atkins* proceedings, nor has it ever identified such a proceeding as one of the 'critical stages' to which the right attaches." *Id.* at 1184. This was because "the right to counsel flows directly from, and is a *necessary* corollary to, the clearly established law of *Atkins*." *Id.* (emphasis in original). The same is true here. The requirement to provide Petitioner with funding was a necessary corollary to this Court's holdings in *Ford* and *Atkins* that every person sentenced to death must be permitted to meaningfully present evidence of his mental infirmities. The Fifth Circuit erred by concluding otherwise.

The Fifth Circuit's reasoning was erroneous for another reason: Petitioner was entitled to funding because the determination of whether he is mentally retarded is a critical part of his defense case. This Court "has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system. To implement this principle, [the Court has] focused on identifying the basic tools of an adequate defense or appeal, and [has] required that such tools be provided to those defendants who cannot afford to pay

for them." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quotation marks omitted); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted [the Due Process Clause] to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." (quotation marks omitted)).

In *Ake*, this Court required the state to appoint a psychiatrist where the defendant intended to present a defense of insanity: "when the State has made the defendant's mental condition relevant to his criminal culpability and *to the punishment he might suffer*, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80 (emphasis added). Like the issue of insanity during a trial, an *Atkins* hearing is "part of the criminal proceeding itself" and not "civil in nature." *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (quotation marks omitted). This is because an *Atkins* hearing is inextricably intertwined with sentencing, *see Atkins*, 536 U.S. at 321 ("[The Eighth Amendment] 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citation omitted)), and there is no doubt that sentencing is part of the criminal defense proceedings, *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (recognizing the "critical nature of sentencing in a criminal case"); *see also Hooks*, 689 F.3d at 1184-85. As the Tenth Circuit explained on almost identical facts, an *Atkins* hearing is

"'postconviction' only in the strict chronological sense: *Atkins* was handed down in 2002, after [Petitioner] had been convicted . . . . Of far greater importance is that his *Atkins* [hearing] was 'the first designated proceeding' at which he could raise a claim of mental retardation." *Hooks*, 689 F.3d at 1183. An *Atkins* hearing is therefore a part of Petitioner's criminal defense proceedings, and *Ake* established that indigent defendants are entitled to access to the "basic tools" for their own criminal defense, especially where their mental status is "likely to be a significant factor." *Ake*, 470 U.S. at 74 (holding that where "sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one").

Accordingly, Petitioner was entitled to funding to develop his claims of mental retardation because (1) his *Atkins* hearing was a central part of his criminal defense (despite the unavoidable fact that his hearing occurred years after he was sentenced), (2) his mental status necessarily would be a "significant factor" at his *Atkins* hearing, and (3) his indigency meant he could not otherwise obtain mental testing. The state habeas court's refusal to give such funding amounted to the effective denial of Petitioner's right to the basic tools necessary to mount a defense premised on his mental status, in violation of *Atkins* and *Ake*.

Under the Fifth Circuit's holding, indigent, mentally retarded defendants like Petitioner will be executed because of what amounts to a procedural

technicality, where a defendant's financial inability to collect and proffer evidence showing mental retardation is mistakenly interpreted by state courts as conclusively showing that the defendant *could not* show mental retardation. This deprives defendants like Petitioner of an "opportunity to be heard" as required by *Ford* and *Atkins*, and deprives them of an opportunity to present a defense premised upon their mental status, in violation of *Atkins* and *Ake*.

Because the state habeas court unreasonably applied clearly established federal law, Petitioner was entitled to an evidentiary hearing on the disputed issue of whether he is mentally retarded. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-6 (1992). The district court here held such an evidentiary hearing and concluded that Petitioner is indeed mentally retarded under Louisiana law – and therefore ineligible for execution. Pet. App. 98a. The Fifth Circuit erred by concluding that this evidence must be disregarded. If this Court lets the Fifth Circuit's decision stand, Petitioner will be executed despite the fact that the only court to fully review the evidence concluded that he is indeed mentally retarded under Louisiana law. Pet. App. 98a.

III. Alternatively, the Court Should Grant, Vacate, and Remand this Petition in Light of the Decision in *Hall v. Florida*.

This Court should grant this petition to resolve the circuit split and correct the errors by the Fifth Circuit

described above. If the Court chooses not to do so, however, it is nonetheless necessary to vacate the Fifth Circuit's judgment and remand in light of the Court's recent decision in *Hall v. Florida*, 2014 WL 2178332, at *6.

In *Hall*, this Court considered the constitutionality of Florida's *per se* rule that a defendant with an IQ over 70 was not mentally retarded. *Id.* at *3. In doing so, the Court considered "how [mental retardation] must be defined in order to implement [the] principles and the holding of *Atkins*." *Id.* at *7. The Court explained that IQ tests suffer from an "inherent imprecision," because "[a]n individual's IQ test score on any given exam may fluctuate for a variety of reasons. *Id.* at *9. It cast particular doubt on the practice of relying on a single IQ test, but acknowledged that even "multiple examinations" resulting in "repeated similar scores . . . is not conclusive evidence of intellectual functioning." *Id.* After thorough consideration of the medical evidence, the Court held that when "the individual's IQ score is 75 or below," the mental retardation inquiry must "consider factors indicating whether the person had deficits in adaptive functioning," which "include evidence of past performance, environment, and upbringing." *Id.*; *see also id.* at *14 (holding that "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning"). Accordingly, the Court held unconstitutional Florida's *per se* rule. *Id.* at *16.

Hall's analysis of the relevance of IQ tests to the *Atkins* inquiry has a direct impact on Petitioner's habeas claim. The single IQ test mentioned at Petitioner's penalty phase proceeding was essential to the state court's rejection of his *Atkins* claim. In particular, in denying Petitioner a hearing, the state court relied on Dr. Bolter's testimony that Petitioner "had an IQ of . . . 75." Pet. App. 171a. The court relied on this IQ score to conclude that Petitioner had the requisite intellectual functioning even though Dr. Bolter himself never explained how the IQ test was administered or controlled.[9]

More significantly, the single IQ score offered by Dr. Bolter was the *only* evidence considered by the state court that was actually relevant to Petitioner's claim of mental retardation. As described above, although the state court purported to consider Petitioner's adaptive functioning, the evidence it considered in doing so – Dr. Bolter's testimony that Petitioner may have had "an anti-social personality or sociopath [disorder]" and "no conscience" – was wholly irrelevant and therefore insufficient to satisfy that inquiry. *See Hall*, 2014 WL 2178332, at *9 (where an "individual's IQ score is 75 or below the inquiry would

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[9] The court also referred to Dr. Bolter's testimony that a report by another doctor mentioned a screening test which had "came up with a little bit higher IQ." Pet. App. 171a. As mentioned previously, the score of that IQ test, let alone the means by which it was obtained, was never mentioned at the penalty phase proceeding, and the report itself was never introduced into evidence at any point during the state proceedings. Pet. App. 39a n.13.

consider factors indicating whether the person had deficits in adaptive functioning," which "include *evidence of past performance, environment, and upbringing*"); *id.* at *16 ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."); *see also* La. C. Crim. P. art 905.5.1(H) (requiring consideration of "adaptive behavior *as expressed in conceptual, social, and practical adaptive skills*" (emphasis added)).

Not only was that single, unexplained IQ score of 75 essential to the state court's decision – which is the subject of Petitioner's habeas review – but it was relied upon by the Fifth Circuit in upholding that decision as reasonable. *See* Pet. App. at 14a.

Hall provides strong support to Petitioner's *Atkins* claim. The state court concluded that Petitioner was not mentally retarded based almost exclusively on a single IQ test in which Petitioner earned a score of 75. Neither the State nor Petitioner introduced any other evidence pertaining to mental retardation – which is hardly surprising, given that Petitioner's trial took place before *Atkins* was decided. This is the exact type of adjudication of mental retardation that this Court held unconstitutional in *Hall*.

The Fifth Circuit may well have upheld the state court's assessment based on its view that a single IQ score of 75 was sufficient to establish that Petitioner is not mentally retarded – a view that, in light of *Hall*, is clearly incorrect. Accordingly, if the Court does not grant plenary review, it should vacate the judgment

and remand for the Fifth Circuit to consider the effect of *Hall* in the first instance.[10]

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[10] Even though *Hall* was decided after Petitioner's trial, *Hall* applies to Petitioner's federal habeas petition. *Teague v. Lane*, 489 U.S. 288 (1989), poses no barrier to the retroactive application of *Hall*, because *Hall* did not announce a "new rule" for *Teague* purposes; rather, it merely was an explication of *Atkins*. *E.g.*, *Hall*, 2014 WL 2178332, at *13. Moreover, even if *Hall* did announce a "new rule" for *Teague* purposes, that "new rule" would apply retroactively because it is a substantive rule addressing eligibility for the death penalty – indeed, courts have universally acknowledged that *Atkins* itself applies retroactively. *E.g. In re Campbell*, No. 14-20293, __ F.3d __, 2014 WL 1911444, at *5 (5th Cir. May 13, 2014) ("There is no question that *Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court."). In any event, any question as to whether, or to what extent, *Hall* applies retroactively to prisoners pursuing federal habeas petitions is a question that the Fifth Circuit could address on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,

Fifth Circuit.

Kevan BRUMFIELD, Petitioner–Appellee,

v.

Burl CAIN, Warden, Louisiana State Penitentiary, Respondent–Appellant.

No. 12–30256.

Feb. 28, 2014.

Before: STEWART, Chief Judge, and KING and CLEMENT, Circuit Judges.

CARL E. STEWART, Chief Judge:

IT IS ORDERED that the opinion previously filed in this case, *Brumfield v. Cain*, No. 12–30256, 740 F.3d 946 (5th Cir. Jan. 8, 2014), is WITHDRAWN. The following opinion is substituted therefor:

> The State of Louisiana appeals the district court's imposition of a permanent injunction, enjoining the State from executing Petitioner–Appellee Kevan Brumfield. The district court granted habeas relief in favor of Brumfield, finding that he is mentally retarded[1] and

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[1] As some of our sister Circuits have noted, the preferred terminology for mental retardation is now "intellectual disability."

therefore ineligible for execution based on *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). For the reasons stated herein, we REVERSE the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Trial and Direct Appeal

In 1995, a jury convicted Brumfield of the first degree murder of a Baton Rouge police officer — Corporal Betty Smothers — and sentenced him to death. The Louisiana Supreme Court affirmed his conviction on direct appeal. *State v. Brumfield*, 737 So. 2d 660 (La. 1998). He appealed to the United States Supreme Court, but it denied his petition for a writ of certiorari. *Brumfield v. Louisiana*, 526 U.S. 1025, 119 S. Ct. 1267, 143 L.Ed.2d 362 (1999).

B. State Post–Conviction Proceedings

In 2000, Brumfield filed for post-conviction relief in Louisiana state court alleging, *inter alia*, that he was ineligible for execution due to insanity. In his petition, he also requested funds to further develop his claims. Before the state court considered Brumfield's petition, the Supreme Court issued its decision in *Atkins*, which prohibited the execution of mentally retarded

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See Pizzuto v. Blades, 729 F.3d 1211, 1214 n.1 (9th Cir. 2013) (citation omitted); *Hooks v. Workman*, 689 F.3d 1148, 1159 n.1 (10th Cir. 2012) (citation omitted). Nevertheless, because mental retardation is used by the parties and the applicable legal authority, we use mentally retarded throughout our opinion.

criminals. Brumfield then amended his state petition to assert an *Atkins* claim and that he was entitled to an evidentiary hearing on his mental retardation claim. As evidence of his claim, Brumfield provided the following: 1) his IQ score, obtained prior to trial, of 75; 2) his slow progress in school;[2] 3) his premature birth;[3] 4) his treatment at multiple psychiatric hospitals; 5) various medications he was prescribed; and 6) testimony that he exhibited slower responses than "normal babies," suffered from seizures,[4] and was hospitalized for months after his birth. In the petition, Brumfield again requested funds to develop his claims.

On October 23, 2003, the state trial court conducted a hearing on Brumfield's pending petition. At the hearing, the trial court denied Brumfield's petition in its entirety and stated as to the *Atkins* claim:

> I guess the biggest [issue] we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that

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[2] There was testimony that Brumfield read on a fourth grade level, was placed in special education classes, and was diagnosed with a learning disability.

[3] We note that, while Brumfield claimed he was born prematurely, this assertion is contradicted by the record. However, he accurately stated that his birth weight was 3.5 pounds.

[4] This assertion is also belied by the record, which only reflects that one seizure occurred.

> everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that [ ] is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue — there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found [Brumfield] had an IQ of over — or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to [an *Atkins*] hearing based on all of those things that I just set out.

The trial court did not address Brumfield's request for funding, and Brumfield's counsel did not raise the issue or specifically object to the court's failure to address it.

Brumfield then filed a writ with the Louisiana Supreme Court, alleging, *inter alia*, that the district court erred in failing to hold an *Atkins* hearing because

he had presented substantial evidence supporting the claim. In the application, Brumfield requested an *Atkins* hearing as well as funding. The Louisiana Supreme Court denied petitioner's writ without explanation. *Brumfield v. State*, 885 So. 2d 580 (La. 2004).

C. Federal Post–Conviction Proceedings

On November 4, 2004, Brumfield timely filed a petition for a writ of habeas corpus with the federal district court. The petition asserted, among other things, that the state court erred in failing to grant relief as to Brumfield's *Atkins* claim and in failing to hold an *Atkins* hearing. Brumfield also requested funds to enable him to properly present his claims.

After Brumfield filed his petition, the district court appointed counsel, and the Federal Public Defender Board provided expert funding. In 2007, Brumfield amended his petition to incorporate the expert findings. The magistrate judge ("MJ") issued a Report and Recommendation, which first found, when considering the evidence Brumfield submitted to the state court, the state court's refusal to grant an *Atkins* hearing to be "reasonable and in accordance with clearly established federal law." However, the MJ concluded that it should consider the additional evidence Brumfield presented in his amended habeas petition. In the MJ's view, Brumfield demonstrated cause for failing to provide the state court with the new evidence because he did not have the requisite funding. Additionally, if Brumfield was barred from presenting the new evidence, he would be prejudiced due to a state statute of limitation. After reviewing the additional

evidence, the MJ concluded that Brumfield had established a prima facie case of mental retardation such that he was entitled to an *Atkins* hearing. The district court adopted the MJ's report and recommendations, and it held a six-day *Atkins* evidentiary hearing in 2010.

On February 22, 2012, the district court granted Brumfield's petition for a writ of habeas corpus on the ground that he is mentally retarded and therefore ineligible for execution. The district court then issued a permanent injunction, forbidding the State from executing Brumfield. The State timely appealed.[5]

II. DISCUSSION

On appeal, the State first argues that the district court erred by failing to give the proper deference to the state court's denial of Brumfield's request for an *Atkins* hearing. The district court therefore erred, in the State's view, by holding an evidentiary hearing. Alternatively, the State contends that, even if this court were to consider the evidence produced in the federal evidentiary hearing, Brumfield has not proven that he was mentally retarded. We address each argument in turn.

A. Standard of Review

When considering an appeal from a district court's grant of habeas relief, this court reviews issues of law

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[5] Because the State is the appellant, no Certificate of Appealability is required. *Wiley v. Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010); Fed. R. App. P. 22(b)(3).

de novo and findings of fact for clear error. *Wiley*, 625 F.3d at 204–05 (citing *Fratta v. Quarterman*, 536 F.3d 485, 499 (5th Cir. 2008)). The Antiterrorism and Effective Death Penalty Act ("AEDPA") limits the ability of a federal court to issue a writ of habeas corpus to a state prisoner where the prisoner's claim was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, ____U.S. ____, 131 S. Ct. 770, 784–85, 178 L.Ed.2d 624 (2011). This is true whether the state court addresses all, some, or none of a prisoner's claims. *See Johnson v. Williams*, ____U.S. ____, 133 S. Ct. 1088, 1094, 185 L.Ed.2d 105 (2013).

When a state court adjudicates a prisoner's claim on the merits, a federal habeas court "shall not" grant the prisoner's writ of habeas corpus unless the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

Under § 2254(d)(1), the law must be "clearly established in the holdings of [the Supreme] Court" at the time of the state court's decision. *Harrington*, 131 S. Ct. at 785 (citation omitted). "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 176 L.Ed.2d 678 (2010) (citation omitted). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Harrington*, 131 S. Ct. at 786 (internal quotation marks and citation omitted) (first alteration in original). "[A] habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* A state court's decision is not entitled to AEDPA deference under § 2254(d)(1) "if the state court correctly identifies the governing legal principle from the Supreme Court's decisions, but unreasonably applies it to the facts of the particular case" or if the state court "extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Chester v. Thaler*, 666 F.3d 340, 344 (5th Cir. 2011) (alteration in original) (citations and internal quotation marks omitted).

Under § 2254(d)(2), "relief may not be granted unless the decision was based upon an unreasonable

determination of the facts in light of the evidence presented in the State court proceedings. A factual determination made by a state court must be rebutted by clear and convincing evidence." *Id.* at 348 (quoting *Clark v. Quarterman*, 457 F.3d 441, 443 (5th Cir. 2006)) (internal quotation marks omitted). "The question of whether a defendant suffers from mental retardation involves issues of fact, and thus is subject to a presumption of correctness that must be rebutted by clear and convincing evidence under Section 2254(e)(1)." *Id.* (quoting *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010)) (internal quotation marks omitted).

B. Applicable Law

The Supreme Court "did not provide definitive procedural or substantive guides for determining when a defendant is mentally retarded." *Hearn v. Thaler*, 669 F.3d 265, 272 (5th Cir. 2012) (quoting *Bobby v. Bies*, 556 U.S. 825, 831, 129 S. Ct. 2145, 173 L.Ed.2d 1173 (2009)) (internal quotation marks omitted). Instead, the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [the] execution of sentences." *Atkins*, 536 U.S. at 317, 122 S. Ct. 2242 (internal quotation marks and citation omitted). Therefore, we examine Louisiana law to determine whether Brumfield established the prerequisites of an *Atkins* claim.

Louisiana defines mental retardation as "a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive

skills. The onset must occur before the age of eighteen years." La. Code Crim. Proc. art. 905.5.1(H)(1). The Louisiana Supreme Court has held that the confidence range associated with an intellectual quotient ("I.Q.") score of 75 "brush[es] the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired." *State v. Dunn* (*Dunn III*), 41 So. 3d 454, 470 (La. 2010).

Adaptive functioning "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Id.* at 463 (internal quotation marks and citation omitted). The Louisiana Supreme Court has recognized "six major life activities related to adaptive functioning: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living." *Id.* (citation omitted). This prong is satisfied when there are "significant limitations in ... at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety...." *Id.* at 459

In *State v. Dunn* (*Dunn II*), 974 So. 2d 658, 662 (La. 2008) (per curiam), the Louisiana Supreme Court held that the procedure it explained in *State v. Williams*, 831 So. 2d 835 (La. 2002) governed cases in which the issue of whether to hold an *Atkins* hearing is raised

post-trial. That is, a defendant must first "come forward with some evidence to put his mental condition at issue." *State v. Dunn* (*Dunn I*), 831 So. 2d 862, 884 (La. 2002). The defendant must undergo a mental examination "[i]f the court has reasonable ground to doubt whether the defendant is mentally retarded." *Id.* Essentially, "[t]he defendant [must] come forward with some evidence initially to put his or her mental condition at issue." *Dunn III*, 41 So. 3d at 461. Then, the "defendant must prove his or her mental retardation by a preponderance of the evidence." *Id.*

C. Analysis

We first consider whether the state court's judgment was "on the merits" as contemplated by § 2254(d). We agree with the district court that the state court's decision was "on the merits." 28 U.S.C. § 2254(d). The state court did not cite any procedural grounds relating to Brumfield's mental retardation claim in its decision or at its hearing.[6] Therefore, the state court's determination is due AEDPA deference unless an exception under §§ 2254(d)(1)-(2) applies. Because no exception applies, we hold that the state court's judgment was entitled to AEDPA deference.

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[6] Even though the state court did not discuss Brumfield's funding request, we presume that its denial of funds was also a decision "on the merits." *See Johnson*, 133 S. Ct. at 1096 ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.").

1. *28 U.S.C. § 2254(d)(1)*

The district court erred in its determination that the state court decision was not entitled to AEDPA deference. In the district court's view, the state court was required to provide Brumfield with the funds necessary to develop his claims. However, there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case. Rather than present cases holding that Brumfield was entitled to funding to develop his prima facie case, the district court faulted the state court for failing to extend the due process precepts in *Atkins*, *Ford*, and *Panetti* to encompass this aspect of due process. *See Chester*, 666 F.3d at 344 (holding that a state court's decision is not entitled to AEDPA deference under 2254(d)(1) where the court "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply").

The district court's holding was an unwarranted extension of Supreme Court jurisprudence. *See id.* at 345 ("The first step in determining whether a state court unreasonably applied clearly established federal law is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Under *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L.Ed.2d 662 (2007), and *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986), a court is explicitly required to provide an "opportunity to be heard" once the prisoner has made a "substantial threshold showing of insanity." *Panetti*, 551 U.S. at 949, 127 S. Ct. 2842 (internal quotation marks and

citation omitted). This includes the opportunity to submit expert evidence. *Id.* at 951, 127 S. Ct. 2842. However, nowhere does the Supreme Court hold that this opportunity requires the court or the state to provide the prisoner with funds to obtain this expert evidence. Nor has this circuit recognized that such an established federal right exists. *See Morris v. Dretke*, 413 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J., concurring) ("[T]he State was within its rights to deny [the petitioner] assistance in obtaining intellectual testing [in order to make out a prima facie case of mental retardation].").

We have explained the due process rights due "under *Ford* [:] [o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (second alteration in original) (quotation omitted). Similarly, "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation ... the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Id.* Thus, the strictures of procedural due process associated with *Ford* and *Panetti* attach only *after* a prisoner has made a "substantial threshold showing." Accordingly, we hold that the state court did not violate § 2254(d)(1).[7]

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[7] Unlike the situation before us in *Wiley*, 625 F.3d 199, there is no violation of due process that would render deference to the state

2. *28 U.S.C. § 2254(d)(2)*

Similarly, the state court's judgment did not violate § 2254(d)(2). Our review of the record persuades us that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing. The district court erroneously found that the state court rested its ruling on Brumfield's adaptive skills and faulted the state court for failing to provide Brumfield with the requisite funding. The district court also chided the state court for relying on evidence presented for mitigation purposes and deciding Brumfield's claim based on a record which failed to discuss all of the necessary elements. In addition, the district court concluded that the state court wrongly used competency evidence to determine Brumfield's *Atkins* claim.

Contrary to the district court's ruling, the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation. The state court noted that of the two I.Q. tests, one returned a score of 75 and the other returned "a little bit higher I.Q." The state court then properly considered the evidence of adaptive functioning that Brumfield presented. The state court concluded that

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court inappropriate. In *Wiley*, because the state court failed to follow its own procedure, we held that the state court was not due deference under AEDPA. *Id.* at 211. Conversely, neither Brumfield nor the district court could point to any state law or procedure violated by the state court when it denied his *Atkins* claim and request for funds. The cases relied on by Brumfield and the district court simply do not support their contention that the state court strayed from the applicable Louisiana law on this issue.

Brumfield had not "demonstrated impairment in adaptive skills." The district court criticized the state court for not analyzing each sub-factor of the adaptive skills prong, but there is no requirement that the state court articulate all of its reasons. Notably, no one testified that Brumfield was mentally retarded. Indeed, the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality. There was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships. Based on the evidence in the record, we conclude that the state court did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue. *See State v. Tate*, 851 So. 2d 921, 942 (La. 2003) (holding that the defendant failed "to establish reasonable grounds that [he] may be mentally retarded"). Thus, the state court's decision does not fall under the exceptions in § 2254(d) and was entitled to AEDPA deference.

In sum, the district court erred when it failed to give the proper AEDPA deference to the state court's decision. Because the state court's judgment was entitled to AEDPA deference, "there was no reason for the district court to conduct an evidentiary hearing." *Blue v. Thaler*, 665 F.3d 647, 661 (5th Cir. 2011). Accordingly, it was error for the district court to conduct such a hearing, and we therefore disregard the evidence adduced for the first time before the district court for purposes of our analysis under § 2254(d). *See Cullen v. Pinholster*, ____ U.S. ____, 131 S. Ct. 1388, 1398, 179 L.Ed.2d 557 (2010) ("[R]eview under §

2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Blue*, 665 F.3d at 655–56 ("Pinholster prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254(d).").[8]

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of habeas relief in favor of Brumfield.

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[8] Even if we were to consider the new evidence presented to the district court, we likely would hold that Brumfield failed to establish an *Atkins* claim. *See Dunn III*, 41 So. 3d 454 (holding, under similar circumstances, that the defendant failed to carry his burden of establishing that he was mentally retarded).

Appendix B

United States District Court,

M.D. Louisiana.

Kevan BRUMFIELD

v.

Burl CAIN, Warden, Louisiana State Penitentiary.

Civil Action No. 04–787–JJB–CN.

Feb. 23, 2012.

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

JAMES J. BRADY, District Judge.

Before the Court is Kevan Brumfield's petition for a writ of habeas corpus filed against Burl Cain, the warden of the Louisiana State Penitentiary in Angola, Louisiana. Brumfield asks this Court to declare him mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). (Docs. 111, 121). His petition is opposed by the State of Louisiana. (Doc. 118). The Court held an *Atkins*[1] evidentiary hearing on the issue of petitioner's mental retardation[2] on July 12–16 and August 3–4, 2010.

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[1] *Atkins* hearings assess evidence of a person's intellectual functioning, adaptive skills, and personal history to determine whether the person is mentally retarded.

[2] The term "mental retardation" has fallen out of favor with clinical psychologists, some of whom now prefer the term "intellectual

I.

Petitioner Kevan Brumfield was convicted in Louisiana state court of the 1993 murder of a Baton Rouge police officer and sentenced to death by a jury in 1995. *State v. Brumfield*, No. 1–93–865 (19th Judicial District Court, East Baton Rouge Parish, Louisiana) (Tyson, J.). The Louisiana Supreme Court affirmed his conviction on direct appeal. *State v. Brumfield*, 737 So. 2d 660 (La. 1998). The United States Supreme Court denied his petition for a writ of certiorari. *Brumfield v. Louisiana*, 526 U.S. 1025, 119 S. Ct. 1267, 143 L.Ed.2d 362 (1999).

Brumfield is in the custody of the State of Louisiana by virtue of his incarceration at the Louisiana State Penitentiary in Angola. In 2000, he filed for post-conviction relief in Louisiana state court, alleging among other things that he has was ineligible for execution by reason of insanity and mental incompetency. *State of Louisiana ex rel. Brumfield v. Cain*, No. 1–93–865 (19th Judicial District Court, East Baton Rouge Parish, Louisiana). Brumfield's petition relied on evidence submitted at his sentencing hearing. (*See* Post–Conviction Petition, Vol. PC).[3]

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disability." However, because the relevant statutes and precedents speak in terms of mental retardation, the Court does so as well. *See State v. Corey Williams*, 831 So. 2d 835, 838 n.2 (La. 2002), *superseded by statute in part by* La. C. Cr. P. art. 905.5.1 (describing the court's deference to existing terms in the evolving forensic psychology field).

[3] The entirety of the state court record (Doc. 3) is available only in hard paper form. The trial on the guilt and sentencing phase is

On June 16, 2003, within a year of the date the Supreme Court barred executing mentally retarded persons in its 2002 *Atkins* decision, Brumfield amended his state post-conviction petition, asserting an *Atkins* claim for the first time. (Amended Post–Conviction Petition, Vol. PC). The State filed an answer, arguing that the evidence from the penalty phase of the trial on which Brumfield relied was insufficient to state a *prima facie* case necessary to trigger an *Atkins* evidentiary hearing. (Answer to Amended Petition, Vol. PC, pp. 1–6). On September 23, 2003, Brumfield replied to the State's answer, contending the State's response for denying an evidentiary hearing did not comport with precedent. (Brumfield's Reply to State's Answer to Amended Petition, Vol. PC, pp. 1–2).

The state habeas court tasked with assessing Brumfield's post-conviction petition denied him an evidentiary hearing on the *Atkins* issue. (Transcript of State Post–Conviction Hearing on October 23, 2003, Vol. PC, p. 2) (Anderson, J.). In so doing, the state habeas court mooted Brumfield's pending requests for funding to develop his *Atkins* claim. (*See* Initial State Court Petition for Post–Conviction Relief, Vol. PC, ¶¶ 32(p), 36–37) (describing lack of funds to retain experts to conduct neurological examinations of Brumfield); Expedited Motion for Order on Petition for Post–Conviction Relief, Vol. PC, ¶¶ 3–7; (Amended State

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catalogued in 16 volumes (cited as, *e.g.*, "Vol. IV," etc.). Several supplementary volumes detail the docket activity prior to and after trial. Finally, a post-conviction volume (cited as "Vol. PC") contains the record from Brumfield's state habeas proceedings.

Court Petition for Post–Conviction Relief, Vol. PC, ¶¶ 104–05) (seeking funds to retain experts for evaluating Brumfield in variety of areas); Reply to State's Answer to Amended Petition, Vol. PC, ¶ 10 (reiterating need for expert funding). At the same hearing, the state trial court summarily denied Brumfield's petition in its entirety. (Transcript of State Post–Conviction Hearing on Oct. 23, 2003, Vol. PC, pp. 1–16). The Louisiana Supreme Court likewise denied review of the state habeas judge's rulings. *Brumfield v. State*, 885 So. 2d 580 (La. 2004).

On November 4, 2004, petitioner timely filed his petition for a writ of habeas corpus in this Court. (Doc. 1). On November 1, 2007, petitioner amended his petition after finally receiving funding to develop certain of his habeas claims for relief, including his *Atkins* claim. (*See* Doc. 30, pp. 1–6) (recounting the various failures of the Louisiana Indigent Defense Assistance Board, Brumfield's previous counsel, to provide adequate funding, as recognized by the Louisiana Supreme Court in *State ex rel. Williams v. State*, 888 So. 2d 792 (La. 2004)). Following answers by the State, the magistrate judge issued a report and recommendation that Brumfield's habeas petition be denied in full except to the extent that Brumfield was entitled to an evidentiary hearing on his *Atkins* claim. (Doc. 37).

Following objection by the State and oral argument on the issue, this Court approved and adopted the magistrate judge's report and recommendation in full. (Doc. 43). The Court then held its *Atkins* evidentiary hearing from July 12–16 and August 3–4, 2010.

Petitioner filed his post-hearing brief (Doc. 111), the State filed its opposition brief (Doc. 118), and petitioner filed a reply brief (Doc. 121) on November 21, 2011, which submitted the matter to this Court.

II.

Despite having already held an evidentiary hearing on petitioner's *Atkins* claim, the State asserts newly-decided cases of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit have changed the law and altered the propriety of that action. Because such a claim, if true, would preclude reaching the merits of petitioner's *Atkins* claim, the Court proceeds to address this matter. The Court will treat the State's briefing on the issue as a motion for reconsideration in light of the newly-issued decisions.

A. The Magistrate Judge's Report and Recommendation Adopted by This Court

The magistrate judge's report and recommendation (Doc. 37) outlined the reasons for granting petitioner an *Atkins* hearing. Because Brumfield's sentence pre-dated *Atkins* and his post-conviction application in state court relied on evidence introduced at Brumfield's sentencing hearing, the magistrate judge assessed that evidence and agreed with the state habeas judge that Brumfield failed to meet his burden of presenting sufficient facts to put his mental retardation at issue. (Doc. 37, p. 20). Furthermore, the magistrate judge,

citing *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005)[4], raised but did not decide whether the newly-presented evidence of mental retardation in Brumfield's federal habeas petition "merely supplemented" rather than "fundamentally altered" his mental retardation claim under the exhaustion requirement. (*Id.* pp. 22–31). Instead, the report concluded that petitioner's failure to adequately develop his claims in state court resulted from the state court's refusal to grant him funds to develop expert testimony necessary to substantiate his *Atkins* claim. (*Id.* pp. 30–32). The magistrate judge found that Brumfield's diligence in consistently pressing his *Atkins* claim in the state habeas court, coupled with the state court ignoring his multiple requests for funding for expert assistance in developing his claim, satisfied the cause and prejudice test. (*Id.*). Moreover, because the magistrate judge found the additional evidence contained in Brumfield's amended federal habeas petition constituted a *prima facie* showing under *Atkins*, the report recommended this Court conduct an evidentiary hearing. (*Id.* p. 32).

The State objected to the report's conclusion that an evidentiary hearing was warranted. (Doc. 38). It first argued that under *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007), Brumfield's newly-presented evidence

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[4] *See also Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003); *Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003); *Dowthitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000) (cases determining whether evidence in a federal habeas petition "fundamentally altered" or "merely supplemented" a claim from state habeas proceedings for purposes of AEDPA's exhaustion requirement).

of mental retardation "fundamentally altered" his *Atkins* claim, rendering it unexhausted.[5] The State also argued that since Brumfield failed to make a reasonable showing of mental retardation to the state habeas court, it correctly found he failed to present a *prima facie* case as required by Louisiana law, which is entitled to a presumption of correctness.[6] The Court held oral argument on the matter, agreed with the magistrate judge (Minute Entry for June 30, 2008, Doc. 42), and issued a ruling adopting the report as its decision (Doc. 43).

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[5] Unexhausted claims, like procedurally defaulted claims, may nonetheless be excused and thus properly raised in a federal habeas petition if the petitioner "can demonstrate cause ... and actual prejudice." *Moore*, 491 F.3d at 220 (quoting *Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001)).

[6] Crucially, the State did not attempt to justify the state habeas court's failure to consider Brumfield's funding requests, nor did it attempt to show that Brumfield did not meet the cause and prejudice test. (*See* Objection to Report, Doc. 38). As the standard notice attached to the report and received by the State notes, "[t]he failure of a party to file written objections to the proposed findings, conclusions, and recommendation contained in a Magistrate Judge's Report and Recommendation ... shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge that have been accepted by the District Court." (Magistrate Judge's Report, Doc. 37, p. 1 (citing 28 U.S.C. § 636(b)(1))). The parties therefore agree that, for purposes of 28 U.S.C. § 2254(e)(2), Brumfield has satisfied that test, and the Court agrees.

B. Legal Prerequisites to a Federal Habeas Hearing

Federal habeas law precludes federal courts from re-adjudicating a claim that was adjudicated on the merits in state court unless the state court decision was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Even a state court adjudication found incorrect under federal standards does not necessarily suffice in meeting this statutory standard; the state court action must also be objectively unreasonable such that fair-minded jurists would agree on the impropriety of the state court decision. *Harrington v. Richter*, ____ U.S. ____, 131 S. Ct. 770, 785–86, 178 L.Ed.2d 624 (2011). In all inquiries under § 2254(d), federal review is confined to the record before the state court. *Cullen v. Pinholster*, ____ U.S. ____, 131 S. Ct. 1388, 1398, 179 L.Ed.2d 557 (2011); *Richter*, 131 S. Ct. at 785.

State court factual determinations are presumed correct unless a petitioner overcomes that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The interplay between § 2254(d)(2) and (e)(1) has been the subject of much spilled ink, but the Supreme Court has not definitely decided the issue.[7] It

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[7] *See Valdez v. Cockrell*, 274 F.3d 941, 951, n.17 (5th Cir. 2001) (holding that § 2254(e)(1)'s presumption of correctness applies to

has, however, made clear that the two inquiries do not merge. *Miller–El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L.Ed.2d 931 (2003).

A habeas applicant who "failed to develop the factual basis of a claim in State court" may nevertheless obtain an evidentiary hearing on the claim if "a factual predicate [ ] could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). This factual proffer, as a pre-requisite to a hearing, must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B); *see also Michael*[8] *Williams v. Taylor*, 529 U.S. 420, 432, 120 S. Ct. 1479, 146 L.Ed.2d 435 (2000) ("Under ... § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."). Thus, the "cause and prejudice" inquiry of § 2254(e)(2) only attaches to

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particular factual findings which a petitioner must overcome by clear and convincing evidence as to that particular factual finding but that the standard in § 2254(d)(2) applies to the overall state court decision in light of the facts it finds).

[8] The Court cites the petitioner's first name from that case for two reasons: (1) to distinguish the case from *Terry Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000), another U.S. Supreme Court case decided the same term; and (2) to distinguish the case from the other two *Williams* cases cited in this opinion that come from the Louisiana Supreme Court: *State v. Corey Williams*, 831 So. 2d 835 (La. 2002) and *State v. Shedran Williams*, 22 So. 3d 867 (La. 2009).

claims that have been procedurally defaulted, not claims decided on the merits. *Michael Williams*, 529 U.S. at 434, 120 S. Ct. 1479 (rejecting a reading of § 2254(e)(2) that would encompass diligently-pursued claims that remained factually undeveloped due to the fault of another party or the court). The fundamental "distinction between a prisoner who is at fault and one who is not," *id.* at 435, 120 S. Ct. 1479, is the line which determines whether a "cause and prejudice" inquiry is necessary under § 2254(e)(2), and diligence marks the touchstone for determining whether an undeveloped factual record stands attributable to the prisoner's "failure" to pursue it, *id.* at 434, 120 S. Ct. 1479 ("[T]he opening clause of § 2254(e)(2) codifies [the previously recognized] threshold standard of diligence....").

Traditional analysis in the Fifth Circuit found that a person who neither had their claims decided on the merits nor who procedurally defaulted through their own lack of diligence needed only to satisfy Rule 8 of the Federal Rules Governing Section 2254 Cases, *see, e.g., Guidry v. Dretke*, 397 F.3d 306, 323 (5th Cir. 2005), and pre-AEDPA case law, *see, e.g., Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963), to receive a federal hearing. However, the *Guidry* decision has been abrogated by the Supreme Court's recent clarification of the interplay of §§ 2254(d) and 2254(e)(2) in *Pinholster* as recognized in *McCamey v. Epps*, 658 F.3d 491, 497, n.1 (5th Cir. 2011). The precise contours of when an evidentiary hearing may be granted have become less clear, but the general trend has diminished the vitality of the pre-AEDPA *Townsend* factors and emphasized the rarity in which

federal hearings should occur. *See, e.g., McCamey*, 658 F.3d 491.

While *Michael Williams* has not been overruled, its explicit holding that § 2254(e)(2) only applies to petitioners who did not diligently attempt to factually develop their claims in state court must be evaluated in light of *Pinholster's* murky statements regarding the interaction of § 2254(d) and § 2254(e)(2). Textually, the provisions seem to apply only in mutually exclusive situations, as *Michael Williams* pointed out, but lately the Supreme Court seems to have implied that the "cause and prejudice" standard codified in § 2254(e)(2) nonetheless may apply even to claims that have already met one of the § 2254(d) standards. *See Pinholster*, 131 S. Ct. at 1401 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief.... At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." (citation omitted)); *id.* at 1412 (Breyer, J., concurring in part and dissenting in part) ("[Section] 2254(d)(1) does not leave AEDPA's hearing section, § 2254(e), without work to do.... If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed."). *See also Schriro v. Landrigan*, 550 U.S. 465, 468, 127 S. Ct. 1933, 167 L.Ed.2d 836 (2007) ("In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court.") *and Murphy v. Johnson*, 205

F.3d 809, 815 (5th Cir. 2000) (holding that cases which do not present procedural defaults do not fall under § 2254(e)(2) and thus the propriety of granting a federal hearing is governed by pre-AEDPA jurisprudence). While *Michael Williams* is still good law and thus it appears that §§ 2254(d) and (e)(2) govern different situations, even in *Pinholster's* wake, a federal hearing may in any event be granted under § 2254(e) when the traditional "cause and prejudice" factors have been met.[9]

Either way, the first level of inquiry requires a determination of whether the state court's disposition of Brumfield's *Atkins* claim rested on a state procedural ground — which would then trigger the "cause and prejudice" inquiry of § 2254(e)(2) that the State does not contest Brumfield satisfies — or was made on the merits, which would present a straightforward assessment under § 2254(d).

The totality of the state habeas court's analysis of Brumfield's *Atkins* claim is as follows:

> [T]here are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides'

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[9] To reiterate, the State did not object to the magistrate judge's findings and conclusion regarding Brumfield's satisfaction of the cause and prejudice test under § 2254(e)(2), making re-analysis of that issue unnecessary.

> arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue — there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found he had an IQ of over — or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hasn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Transcript of Post–Conviction Hearing of Oct. 23, 2003, Vol. PC, pp. 3–4.

In the absence of any cited procedural grounds, the Supreme Court has directed federal habeas courts to presume the issue was resolved on the merits. *Richter*, 131 S. Ct. at 784–85. Clearly, there is no reason to

conclude this was merely a procedural default. The state habeas judge's discussion hinges on Brumfield's lack of evidence to establish a *prima facie* case of mental retardation on the adaptive skills prong of the test defined in Louisiana law. The denial of the *Atkins* hearing by the state post-conviction court was a determination on the merits which is reviewed under § 2254(d).

C. The State Court Made a Merits Decision on Brumfield's Atkins Claim by Unreasonably Applying Clearly Established Supreme Court Precedent, Thereby Violating Section 2254(d)(1).

Normally, federal habeas courts owe substantial deference under AEDPA to state court factual findings. 28 U.S.C. § 2254(e)(1). However, when a state court unreasonably applies federal law as an antecedent to a factual determination of a defendant's claim, no AEDPA deference is due the state court's factual determination. *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L.Ed.2d 662 (2007) (holding that a state court's failure to hold an evidentiary hearing when presented with a substantial showing of incompetency deprived defendant of due process and thus unreasonably applied clearly established federal law). In this case, the state habeas judge's refusal to grant an evidentiary hearing based on Brumfield's failure to present a *prima facie* claim of mental retardation (which on the whole may be a mixed question of fact and law but, for purposes of this case, will be presumed a purely factual inquiry) rested on an unreasonable application of clearly established

Supreme Court law, which deprives the state habeas court's determination of AEDPA deference. *See Wiley v. Epps*, 625 F.3d 199, 207 (5th Cir. 2010).

In *Wiley*, the Fifth Circuit found that when a petitioner presents a *prima facie* case of mental retardation but is nevertheless denied a state court hearing on the issue, the state court's determination of the mental retardation issue does not deserve deference under the AEDPA. 625 F.3d at 207. The Fifth Circuit noted that *Atkins* "was decided against the backdrop of the Supreme Court's and lower court's due process jurisprudence." *Id.* (quoting *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007)). This jurisprudence included *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L.Ed.2d 335 (1986), which required a hearing in accord with fundamental fairness and procedural due process for defendants making a showing of insanity. *Id. Rivera* held that a *prima facie* showing of mental retardation in state court requires it to provide a full and fair evidentiary hearing. 505 F.3d at 357–58. Using these teachings, *Wiley* set out a framework for analysis: a federal habeas court must decide if a *prima facie* case of mental retardation under state law (pursuant to *Atkins*) was presented to the state court, which triggers the requirement for a full evidentiary hearing. 625 F.3d at 207. If the petitioner did so but did not receive a hearing, the state court acted unreasonably in light of clearly established federal law and consequently loses AEDPA deference. *Id.* at 207–08.

Brumfield presents an even stronger case for denying AEDPA deference than was found in *Rivera*

or *Wiley*. Here, the state court denied Brumfield even the opportunity to develop his *prima facie* case. The state habeas court ignored at least four clear pleas for funding to retain experts to evaluate Brumfield and develop his then-pending claims. If *Rivera*, *Panetti*, and *Wiley* deny AEDPA deference based on the state court erroneously failing to grant a hearing to assess a properly made prima facie case, then *a fortiori* a petitioner who is denied even the chance to make such a case deserves the same treatment. Accordingly, the state court violated Brumfield's due process guarantees when it failed to allow him adequate funding to retain experts to address his claim. *Cf. Coleman v. Zant*, 708 F.2d 541, 548 (11th Cir. 1983) (holding that when a state court denies an indigent petitioner with the funds necessary to develop adequate evidence to support a habeas claim, that denial fails to accord a "full and fair" hearing under *Townsend v. Sain*).[10] This denial came in the face of clearly established federal law as determined by the Supreme Court circa October 23, 2003, the date the state habeas court denied Brumfield's *Atkins* claim and, in so doing, essentially

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[10] A full and fair hearing is no longer necessarily a prerequisite for AEDPA deference, *see Valdez v. Cockrell*, 274 F.3d 941, 946 (5th Cir. 2001), but that is because a full and fair hearing on a post-conviction claim no longer serves as a requirement of due process or § 2254, *see, e.g., Richter*, 131 S. Ct. at 784, *not* because due process is wholly inapplicable in the post-conviction setting. When due process has been violated by a state court, AEDPA simply does not require deference be given to subsequent state court determinations related to that violation. *Panetti*, 551 U.S. at 953, 127 S. Ct. 2842.

ignored and mooted his pending requests for expert funding. Specifically, both *Atkins* and *Ford* had been decided and clearly established before that date.

This jurisprudential backdrop should not have been ignored by the state habeas court, and failure to grant the expert funding (or allow counsel time to obtain such funding from another source) constituted not just a violation of general federal due process law, but also a stark departure from clearly established state law as determined by the Louisiana Supreme Court. As noted above, the Louisiana Supreme Court in *State ex rel. Williams v. State*, 888 So. 2d 792 (La. 2004), eventually recognized the frustrating situation petitioners such as Brumfield found themselves in when represented by *pro bono* counsel. The Louisiana Indigent Defense Assistance Board (LIDAB) has been delegated statutory authority to provide Louisiana state habeas petitioners with counsel, and they contracted with the Capital Post–Conviction Project of Louisiana (CPCPL) to provide such services. LIDAB had a rule prohibiting *pro bono* counsel handling capital post-conviction cases from getting funds for expert witnesses from LIDAB, which drew the interest of the Court. 888 So. 2d at 797. LIDAB immediately changed its rule and permitted *pro bono* counsel to acquire funds to retain expert assistance in capital post-conviction cases. While the state habeas court did not have the benefit of that guidance, there existed a litany of Louisiana Supreme Court cases addressing the necessity of giving post-conviction petitioners time and funding to develop claims. *See, e.g., State ex rel. Cage v. Butler*, 593 So. 2d 375 (La. 1992); *State ex rel. Deboue v. Whitley*, 592 So.

2d 1287 (La. 1992); *State v. Brown*, 566 So. 2d 967 (La. 1990). These Louisiana cases do not establish a § 2254(d)(1) violation, of course, but they do illustrate the gravity of the due process violation.

This Court remains keenly aware of *Atkins'* admonition that "[n]ot all people who claim to be mentally retarded will be so impaired," 536 U.S. at 317, 122 S. Ct. 2242, as to fall within the class of persons for whom a hearing must be held. Clearly, because the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction," *id.*, it also left to the States the ability to perform a meaningful screening of such claims. Having a *prima facie* prerequisite to obtaining a full hearing makes eminent sense, lest every death row inmate bring an *Atkins* claim simply to delay their execution. *See Corey Williams*, 831 So. 2d at 858, n.33 ("There is no automatic right to a hearing on the issue of mental retardation....").

Likewise, requiring some rudimentary, preliminary showing of a colorable mental retardation claim in order to obtain expert funds to more fully explore the issue also seems reasonable. *Cf. id.* (holding that the "reasonable grounds" test to show a *prima facie* case and trigger an *Atkins* evidentiary hearing requires a defendant to come forward "with some evidence to put his mental condition at issue"); *see also State v. Campbell*, 983 So. 2d 810, 826, n.9 (La. 2008) (refusing to allow hearing on mental retardation issue despite an IQ test of 67 because "the defendant refused point-black to participate in evaluations [by State experts]

designed to determine whether he is mentally retarded").

But as this case illustrates, wholly ignoring clear requests for funding to retain experts — based presumably, though the Court cannot know because the state court never supplied a reason, on the same reasons why the state court denied the claim in its entirety — shows this silent denial to be a particularly cruel and unreasonable catch–22: without expert funding, no *prima facie* showing is likely possible, yet without a *prima facie* showing, no expert funding is forthcoming. The state habeas court's imposition of this catch–22 finds no support in any precedent and sharply diverges from clearly established rules for the provision of due process of law.

Thus, this Court is convinced that the denial of Brumfield's *Atkins* claim in the state habeas court, coupled with its silent denial of his request for funding to retain experts to factually develop his claim, was based on the state habeas court's unreasonable application of clearly established federal due process law as determined by the Supreme Court in *Atkins* and *Ford v. Wainwright* (and later confirmed by *Panetti*) at the time the state habeas court rendered its decision, in violation of § 2254(d)(1). Its decision was not only incorrect, but unreasonable, meaning that fair-minded jurists would agree the state court's determination was incorrect. *Richter*, 131 S. Ct. at 785–86.

Moreover, in this instance, the due process rules that were clearly established, both then and now, were

not broad.[11] The due process rules violated here were tailored to address specific situations in which habeas petitioners proffered, or claimed an ability to proffer once given the opportunity, substantial showings of ineligibility for the death penalty based on clearly delineated requirements for *prima facie* showings. The state habeas court's two-fold denial on the merits of Brumfield's *Atkins* claim and silent denial of his request for funding to develop that claim represented an unreasonable application of then-existing due process law as determined by the Supreme Court, which thus deprives that decision of AEDPA deference. This Court was convinced at that point that petitioner's *Atkins* claim showed a reasonable likelihood of success, permitting an adjudication of Brumfield's *Atkins* claim on the merits by virtue of § 2254(d)(1).

D. The State Court Made a Merits Decision on Brumfield's Atkins Claim That Was an Unreasonable Determination of the Facts in Light of the Evidence Presented to the State Court, Thereby Violating Section 2254(d)(2).

For similar reasons, the state habeas court's decision on the merits of Brumfield's *Atkins* claim suffered from an unreasonable determination of the facts in light of the evidence presented in the state

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[11] The amount of latitude state courts have corresponds with the specificity of the rule "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L.Ed.2d 938 (2004).

habeas proceedings in violation of § 2254(d)(2). Review is limited to the record before the state court. *Richter*, 131 S. Ct. at 785. Federal courts must give deference to state court determinations of historical fact under § 2254(e)(1).[12] *Valdez v. Cockrell*, 274 F.3d 941, 948, n.12 (5th Cir. 2001) (noting that conclusions of law and mixed questions of law and fact are examined under § 2254(d)(1)). When evaluating the different prongs of a mental retardation inquiry, it appears that state court determinations of each prong are considered historical fact determinations that are reviewed for clear error and thus receive the full benefit of § 2254(e)(1). *See, e.g.*, *Williams v. Quarterman*, 293 Fed. Appx. 298, 308 (5th Cir. 2008) (construing a Texas state court's evaluation of the mental retardation prongs under the [*Ex parte*] *Briseno*[, 135 S.W.3d 1 (2004)] decision to be purely factual determinations reviewable for clear error); *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (same). Because the state habeas court in this instance clearly pinned its decision on the adaptive skills prong, Brumfield must show by clear and convincing evidence that this determination was wrong.

At least one circuit court has explicitly held that a state habeas court is objectively unreasonable under § 2254(d) when dispositively crediting evidence of mental retardation, received only as a mitigating factor during

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[12] In pertinent part, the statute informs federal courts that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

sentencing in the pre- *Atkins* era, when resolving a full *Atkins* claim in a state habeas court without benefit of a full evidentiary hearing. *Allen v. Buss*, 558 F.3d 657, 661–65 (7th Cir. 2009) (citing *Hall v. Quarterman*, 534 F.3d 365, 371–72 (5th Cir. 2008)).

The Fifth Circuit in *Hall v. Quarterman* further noted that paper hearings may deprive a petitioner of a full and fair hearing, mentioning that they are particularly inappropriate when the state habeas judge faces a different constitutional standard than the sentencing judge did. 534 F.3d at 371–72. Similarly, *Perillo v. Johnson*, 79 F.3d 441, 446–47 (5th Cir. 1996) discussed the adequacy of paper hearings in satisfying the pre-AEDPA constitutional standard for a "full and fair hearing," the existence of which determines whether the state court's determination receives the presumption of correctness in the first place. *But see Valdez v. Cockrell*, 274 F.3d 941, 949–51 (5th Cir. 2001) (holding that a full and fair hearing is not a precondition to giving state courts AEDPA deference). Regardless of *Perillo's* current standing in light of AEDPA, it appears the law still treats the sufficiency of paper hearings on a case-by-case basis. One important benchmark is whether the state habeas judge is the same judge who presided over the petitioner's trial. *Perillo*, 79 F.3d at 446. *See also Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000) (discussing how summary denial by a state court may entitle a petitioner to an evidentiary hearing in federal court).

In this case, the state habeas judge, Judge Anderson, did not conduct Brumfield's capital trial in state district court, which was handled by the late

Ralph Tyson-a beloved, recently-departed colleague on this Court. Under *Hall* and *Perillo*, because the state habeas judge was both a different person than the state trial judge and had to apply a new constitutional standard which was not previously available at trial, no presumption of sufficiency attaches to the paper hearing. Of course, while a change in judicial identity does not on its own alter the reasonability analysis or diminish the presumption of correctness accorded the factual findings, it nonetheless does inform the Court's view of the state habeas court's actions. The Supreme Court's decision in *Richter* is not to the contrary insofar as it does not discuss whether summary dispositions must be viewed through the same lens based on the identity of the state trial and habeas judges.

As the state habeas court itself explained, its review of the *Atkins* claim was limited to the record developed in the sentencing phase of Brumfield's trial, which included the following specific pieces of evidence: the testimony of Dr. John Bolter, the testimony of Dr. Cecile Guin, and a report issued by a Dr. Jordan.[13] Reliance on these pieces of evidence alone, regardless

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[13] As counsel have advised the Court, Dr. Jordan's report was never submitted into ev.dence at any stage of the state court proceedings — both at trial and post-conviction — but it was discussed in Dr. Bolter's submitted expert report (State Trial Record, Vol. II, pp. 267–276) and in the live testimony of both Dr. Bolter and Dr. Guin (State Sentencing Record, Vol. XVI, pp. 3857–3910). The Jordan report was submitted to this Court during its evidentiary hearing, but its content is irrelevant in determining the propriety of the state court action under *Pinholster* since it was not in the state court evidentiary record.

of their intrinsic value, renders the state habeas court decision dubious in and of itself, for several reasons. And when the evidence is actually examined, it is clear that the state habeas court transgressed the bounds of reasonableness in denying Brumfield an evidentiary hearing.

First, the state sentencing took place in 1995, several years before the *Atkins* decision in 2002. During the sentencing phase, neither defense counsel nor the trial court had the benefit of the *Atkins* decision, which may have altered the strategic choices of the defense in deciding not to present mitigating evidence that Brumfield was mentally retarded. *See Atkins*, 536 U.S. at 320, 122 S. Ct. 2242 (holding that as a mitigating factor, mental retardation often serves as a "two-edged sword that may enhance the likelihood" of wrongful execution because jurors may be more inclined to find that individual dangerous); *State v. Corey Williams*, 831 So. 2d 835, 856, n.31 (La. 2002)[14] (pointing out why counsel may avoid introducing

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[14] *Corey Williams* and *State v. Dunn*, 831 So. 2d 862 (La. 2002) ("*Dunn I*") were issued on the same day and dealt with much the same issues, namely, establishing an interim set of procedures for courts to follow in *Atkins* situations until the Louisiana legislature spoke on the issue. While La. C. Cr. P. art. 905.5.1 certainly superseded the inconsistent portions of *Corey Williams* and *Dunn*, as recognized in *State v. Turner*, 936 So. 2d 89, 95 (La. 2006), those decisions retain vitality and have provided guidance in determining questions the statute does not answer. *State v. Dunn*, 974 So. 2d 658, 661–62 (La. 2008) ("*Dunn III*") (recognizing the limited scope of art. 905.5.1 and applying *Corey Williams* to cases in a post-verdict posture).

mental retardation as a mitigating factor); *see also id.* at 856–57 ("[M]ost significantly, *Atkins* changed what would be considered relevant. Prior to the trial, mental retardation was merely a factor in mitigation. Post *Atkins*, mental retardation is a complete prohibition against imposition of the death penalty according to the United States Supreme Court."). At least one member of the Fifth Circuit has concluded that, based upon this language, Louisiana courts cannot rely upon mental retardation evidence presented for mitigation as evidence of *Atkins* mental retardation. *Hall*, 534 F.3d at 392 (Higginbotham, J., concurring in part and dissenting in part) (citing *Corey Williams*, 831 So. 2d at 856–57). While that conclusion may not be treated as a *per se* rule in the Louisiana courts on direct review, *see State v. Manning*, 885 So. 2d 1044 (La. 2004) (declining on direct review to remand for *Atkins* hearing based on State's evidence introduced during pre- *Atkins* sentencing), this case comes before the Court on federal collateral review following state collateral review. And as the cases discussed below will demonstrate, *Manning* at the very least is limited to factual scenarios where the mental retardation issue was actually presented to a jury, even if as mitigating evidence instead of *Atkins* evidence, because Louisiana courts do not tolerate mere mitigation evidence presented on another issue to be used to decide an *Atkins* issue.

Second, the state habeas court had adequate notice that its determination was factually unreasonable in light of the multiple funding requests for the development of expert testimony on Brumfield's

habeas claims. The inexplicable decision to ignore these requests — either because the state habeas judge thought them meritless or unimportant or simply failed to realize they had been made, this Court can only guess — on its face makes the denial of Brumfield's *Atkins* claim unreasonable. The record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation, (*see* Magistrate Judge's Report, Doc. 37), but that in itself is both unremarkable and predictable. Finding that Brumfield failed to establish his *prima facie* case was not the unreasonable factual determination; rather, it was the state court's failure to realize Brumfield had no chance to do so, based on its denial of funds, that comprises the unreasonable determination here.

Third, the state habeas judge hinged his conclusion that Brumfield was not entitled to a hearing on the adaptive skills prong of the mental retardation test that Louisiana law spells out. Not only is this the murkiest and most subjective part of the mental retardation test, as will be made clear below in Part III, but it requires exhaustive factual specificity since so many factors[15] can influence "adaptive behavior as expressed in conceptual, social, and practical adaptive skills." La. C.

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[15] The AAIDD 9th Edition mentions no less than ten factors, and a petitioner must show significant limitation in two of them to qualify as mentally retarded. The AAIDD 10th Edition groups those factors into conceptual, social, and practical domains and requires a petitioner to show significant limitation in one of the overall domains to qualify as mentally retarded.

Cr. P. art. 905.5.1(H)(1). As mentioned above, reliance on record evidence from a pre- *Atkins* sentencing already makes this determination somewhat dubious. When a Louisiana state court relies on record evidence from a pre- *Atkins* sentencing that, *on its own terms, does not even relate to mental retardation*, it cannot be deemed to have made a reasonable factual determination as a matter of law.

The case coming closest to validating the State's position, *State v. Manning*, 885 So. 2d 1044 (La. 2004), simply does not stand for the blanket proposition that "where the record provides sufficient evidence negating a contention that a defendant is mentally retarded, an evidentiary hearing is unnecessary to further litigate [sic] is already established." (State's Objection to Magistrate Judge's Report, Doc. 38, p. 6). In *Manning*, the Louisiana Supreme Court affirmed on direct review a murder conviction and capital sentence. 885 So. 2d at 1057. In the *Manning* Court's discussion of the defendant's *Atkins* claim, 885 So. 2d at 1106–07, the Court simply notes that conflicting testimony was presented at sentencing, with one expert opining that defendant was "mildly retarded or at least slow learner level" and another stating that "he functioned in the 'just below average' range." *Id.* at 1107. In reviewing the defendant's conduct during the investigation, the Court found on the record before it that he failed to demonstrate a reasonable likelihood of mental retardation. *Id. Manning* thus dealt with a situation where, at the very least, evidence of mental retardation was squarely put before the state trial court at sentencing. While the State correctly points out that

the defendant in *Manning* had been sentenced prior to *Atkins*, it fails to note the crucial difference: the *Manning* defendant actually presented evidence of mental retardation to the jury, whereas here Brumfield did not. Moreover, *Manning* came to the Louisiana Supreme Court by way of direct review, which necessarily limited its scope to matters directly litigated, whereas post-conviction review is the proper forum for raising a broader array of claims, including mental retardation issues not submitted to the jury at trial. *Cf. State v. Holmes*, 5 So. 3d 42, 99 (La. 2008) (Calogero, C.J., dissenting) (arguing that an adequately developed record regarding mental retardation, even if not submitted to the jury under La. C. Cr. P. art. 905.5.1, should be reviewable on direct appeal instead of relegating that determination to a post-conviction proceeding, the course the *Holmes* majority required the defendant to pursue).

Fourth, even assuming for the sake of argument that it was not clear legal error to extrapolate *Atkins* evidence on mental retardation from pre- *Atkins* mitigating evidence on competency (the impropriety of which is shown below), the actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts use to assess mental retardation. The Louisiana legislature enacted La. C. Cr. P. art. 905.5.1 during the 2003 regular session as Act No. 698 (House Bill No. 1017), which it approved on June 27, 2003. Because no effective date was provided in that Act, the Court assumes its provisions were effective immediately. *See Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1069 (5th Cir. 1982)

("As a general rule, a new statute should apply to cases pending on the date of its enactment ... unless manifest injustice would result, or there is a statutory directive or legislative history to the contrary." (quotation marks and citations omitted)). Since La.C.Cr.P. art. 905.5.1(H)(1) simply defines adaptive behavior as "expressed in conceptual, social, and practical adaptive skills," Louisiana courts have looked to the AAIDD's clinical definitions for guidance in determining which skills are relevant. *See Corey Williams*, 831 So. 2d 835, 852–54 (noting the U.S. Supreme Court adopted the AAMR's (now the AAIDD's) clinical definition and finding Louisiana's then-existing statutory definition comported with the consensus definition of mental retardation exhibited in the AAMR's definition). A review of the sentencing phase transcript from Brumfield's trial shows that several factors relevant to the adaptive skills prong — including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naïve, and (4) whether he has any practical skills — are simply lacking in discussion or even mention. (Transcript of Sentencing Phase, Vol. XVI, pp. 3857–3910). Based on what testimony the state trial court actually heard, it was unreasonable and unfair for the state habeas judge to conclude Brumfield lacked deficits in adaptive skills when entire areas of adaptive skills were not discussed.

Finally, and fatally for the state habeas court's determination, the Louisiana Supreme Court has conclusively determined the impropriety of collapsing a competency inquiry with a mental retardation inquiry.

In *State v. Holmes*, 5 So. 3d 42, 58 (La. 2008), the Court stated:

> *Equating competency*, which addresses a defendant's ability to understand the proceedings and to assist in her own defense, see La.Code Crim. Proc. art. 641, with mental retardation, which acts as a mitigating circumstance exempting a defendant from the death penalty, constitutes an hyperbole and *does not accord with this state's well-accepted jurisprudence*. (emphasis added).

The *Holmes* Court went on to cite several cases from the late 1970s and early 1980s to support its conclusion, thus showing that that jurisprudence had sufficiently developed by the time the state habeas judge made his decision. *Holmes* repeats the same admonition the Louisiana Supreme Court has previously given on conflating the two separate inquiries. *See State v. Turner*, 936 So. 2d 89, 96 (La. 2006) ("*[E]quating competency* to stand trial *with mental retardation* as an absolute bar to subjection to the death penalty *is a stretch at best.*") (emphasis added). These holdings irrefutably establish the error of the state habeas court and therefore prove, at the very least, that using pre- *Atkins* sentencing evidence related to competency cannot be permitted when deciding an *Atkins* issue. Thus, because the state habeas court reached the merits of Brumfield's *Atkins* claim by relying exclusively on testimony and neuropsychological reports on the issue of competency while knowing Brumfield never had an opportunity to gain funding to hire experts to help support his claim of

mental retardation, Brumfield has furnished clear and convincing evidence the state habeas court made an unreasonable determination of the facts in light of the record evidence (or lack thereof) before it in violation of § 2254(d)(2).

As the preceding discussion illustrates, the issues of factual unreasonableness under § 2254(d)(2) and legal unreasonableness as measured by then-existing Supreme Court law under § 2254(d)(1) inextricably intertwine in this case. Whichever way the state court's determination is sliced, though, the result the law compels this Court to reach remains the same. If the Court's inquiry looks only at the facts in evidence which the state habeas court reviewed, a common sense appraisal of that evidence convincingly shows that the standards relevant to a competency inquiry simply do not equate with the standards relevant to a mental retardation inquiry. That alone makes it a convincing case for an unreasonable factual determination, a conclusion simply bolstered by reviewing Louisiana law, *see State v. Holmes*, 5 So. 3d at 58, and federal law, *see, e.g.*, *Atkins*, 536 U.S. at 320–21, 122 S. Ct. 2242; *Allen v. Buss*, 558 F.3d 657, 661–65 (7th Cir. 2009); *Hall v. Quarterman*, 534 F.3d 365, 371–72 (5th Cir. 2008). The facial unreasonableness of the state court's factual determination under § 2254(d)(2) — non-retardation based on the ill-suited proxy of competency — is further compounded when taking into account the repeated requests Brumfield lodged with the state court seeking funding for expert evaluation. On the other hand, when looking only at the legal standards used and/or complied with by the state court, it is clear

that due process was denied Brumfield. Whether viewed as an action which (1) simply ignored *Atkins's* admonition not to use mitigating evidence as determinative (made even more egregious because the mitigating evidence related to competency, not mental retardation), or (2) failed to follow due process law as established by *Ford v. Wainwright* to grant an evidentiary hearing when a *prima facie* case was presented it (and thus eviscerated due process by preventing Brumfield the opportunity to develop such a *prima facie* case), the state court unreasonably applied those established Supreme Court standards and violated § 2254(d)(1).

The State therefore cannot show that newly-decided cases which constitute binding precedent on this Court make its previous determination to hold an evidentiary hearing improper. Its converted motion for reconsideration is therefore DENIED, and the Court reaffirms its finding that the evidentiary hearing was properly held as detailed in magistrate judge's report and recommendation and supplemented by this ruling.

III.

Having rejected the State's converted motion to reconsider the propriety of the evidentiary hearing the Court already conducted, the Court now deals with the merits of Brumfield's *Atkins* claim.

A. Louisiana Law Has Adopted the Definition of Mental Retardation Contained in the AAIDD's 10th Edition.

In *Atkins v. Virginia*, the United States Supreme Court concluded that capital punishment of a mentally

retarded person violates the Eight Amendment's prohibition against cruel and unusual punishment. 536 U.S. 304, 321, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). However, the *Atkins* Court left to the States the task of defining mental retardation. *Id.* at 317, 122 S. Ct. 2242. The Court did discuss with approval the clinical standards used by the American Association on Mental Retardation (AAMR, hereinafter "AAIDD")[16] and the American Psychiatric Association (APA). *Id.* at 308–09, n.3, 122 S. Ct. 2242. Because there appears to be a dearth of Fifth Circuit cases which apply Louisiana law[17] to an *Atkins* claim, the Court pauses to detail Louisiana statutory and case law, which provide an explanation of the legal framework Louisiana has elected to use pursuant to the *Atkins* mandate.

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[16] *Atkins* cited the AAMR's clinical standard as set forth in *Mental Retardation: Definition, Classification, and Systems of Support* (9th ed. 1992). The AAMR later changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). They have also subsequently updated their text in a 10th Edition, published in 2002, and now an 11th Edition, re-titled as *Intellectual Disability: Definition, Classification, and Systems of Support*, published in 2010. The 11th Edition makes largely cosmetic changes in terminology, as the change in title reflects.

[17] The Fifth Circuit has decided a litany of cases expounding upon the *Atkins* standard in light of Texas law, *e.g.*, *Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), and at least one in light of Mississippi law, *Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010). However, this Court is not aware of any Fifth Circuit decision construing Louisiana law on mental retardation.

In confirming its compliance with the *Atkins* decision, the legislature ensured that, "[n]otwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death." La. C. Cr. P. art. 905.5.1(A). Article 905.5.1(H) of the Louisiana Code of Criminal Procedure provides the operative definition the Court must apply:

> (1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.
>
> (2) A diagnosis of one or more of the following conditions does not necessarily constitute mental retardation:
>
> (a) Autism.
>
> (b) Behavioral disorders.
>
> (c) Cerebral palsy and other motor deficits.
>
> (d) Difficulty in adjusting to school.
>
> (e) Emotional disturbance.
>
> (f) Emotional stress in home or school.
>
> (g) Environmental, cultural, or economic disadvantage.
>
> (h) Epilepsy and other seizure disorders.
>
> (i) Lack of educational opportunities.
>
> (j) Learning disabilities.

(k) Mental illness.

(*l*) Neurological disorders.

(m) Organic brain damage occurring after age eighteen.

(n) Other handicapping conditions.

(o) Personality disorders.

(p) Sensory impairments.

(q) Speech and language disorders.

(r) A temporary crisis situation.

(s) Traumatic brain damage occurring after age eighteen.

La. C. Cr. P. art. 905.5.1(H). Brumfield bears the burden of proving by a preponderance of the evidence that he meets the statutory definition. *Id.*, art. 905.5.1(C)(1).

Louisiana law tracks the clinical definition provided by the AAIDD in *Mental Retardation: Definition, Classification, and Systems of Support* (10th ed. 2002) (hereinafter, "10th Edition").[18] The 10th Edition provides:

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[18]The 10th Edition was introduced into evidence as Petitioner's Ex. 11 (hereinafter cited as "Ex. P-11"). The User's Guide to the 10th Edition, an important supplemental aid, was introduced into evidence as Petitioner's Ex. 13. The 11th Edition was introduced into evidence as Petitioner's Ex. 12.

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

(10th Edition, Petitioner's Ex. 11, at p. 1). But the AAIDD also presents five assumptions that guide application of the clinical definition. Crucially, it notes that individual "limitations often coexist with strengths" and counsels that with appropriate supports, a mentally retarded person's functioning can generally improve. (*Id.*).

The 10th Edition, published in 2002, contains the current, consensus definition of mental retardation, which the Louisiana legislature adopted. (*See* Swanson Testimony, Doc. 106, p. 26 (detailing the drafting history of La. C. Cr. P. art. 905.5.1)). Therefore, reference by the Court to the AAIDD's definition is an appropriate means of discerning what personal characteristics are involved in assessing petitioner's "intellectual functioning and ... conceptual, social, and practical adaptive skills" as defined in art. 905.5.1. The Court finds ample support for adopting the AAIDD's definition in the seminal cases of *Atkins* and *Corey Williams*, and therefore the AAIDD's definition as contained in its 10th Edition will provide the authoritative definition used by this Court in assessing Brumfield.[19] *Cf. Moore v. Quarterman*, 342 Fed. Appx.

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[19] When ambiguities exist or where other sources might provide useful insight, the Court will look to those sources for guidance,

65, 74 (5th Cir. 2009) (finding no abuse of discretion under Texas law in strictly applying the AAIDD 10th Edition's clinical definition).

Because the Court receives substantial guidance from the experts involved, a brief introduction to their qualifications and the basis for and summary of their testimony and conclusions is in order. Testifying for Brumfield were Stephen Greenspan, Ph.D., Ricardo Weinstein, Ph.D., Victoria Swanson, Ph.D., and James Merikangas, M.D.[20] Testifying for the State were Robert Blanche, M.D., Donald Hoppe, Psy.D., and John Bolter, Ph.D.

Dr. Greenspan is a licensed psychologist who obtained his Ph.D. in 1976. (Greenspan Curriculum Vitae, Ex. P–1). At the time of the hearing, he served as a visiting professor at the University of Colorado Medical School. (Greenspan Testimony, Doc. 101, p. 5). He is one of the foremost mental retardation experts in the country, and his work is cited in the 10th Edition numerous times. (*Id.*, pp. 10–11). He was accepted by the Court as an expert in mental retardation and adaptive behavior. (*Id.*, pp. 24–25). His testimony generally concerned proper use of the AAIDD's clinical standards in making diagnoses of mental retardation. (*See generally* Greenspan Testimony, Doc. 101, pp. 4–218).

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but because the legislature implicitly endorsed the 10th Edition's definition, the Court will consider that source first.

[20] Merikangas submitted an expert report but did not testify at the hearing.

Dr. Weinstein is a licensed psychologist who obtained his Ph.D. in 1981. (Weinstein Curriculum Vitae, Doc. 30–1, p. 20). At the time of the hearing, Dr. Weinstein had a forensic practice and also testified as an *Atkins* expert in various courts. (Weinstein Testimony, Doc. 101, pp. 219–230). He was accepted by the Court as an expert in mental retardation and forensic neuropsychology. (*Id.*, p. 234). He made a diagnostic evaluation of Brumfield after: personally meeting with Brumfield on two occasions for 5–6 hours; speaking with him for another 7 hours; reviewing Brumfield's social history; school records; medical records; institutional records; prison records; previous expert reports, evaluations, and depositions; Brumfield's prior statements to police; and interviews with at least 14 individuals. (Weinstein Testimony, Doc. 102, pp. 19–37). He also administered the ABAS–II adaptive behavior scales to several individuals. His testimony concerned his methodology and reasoning for reaching the conclusion that Brumfield is mentally retarded. (*See generally* Weinstein Testimony, Docs. 101, pp. 219–284 *and* 102, pp. 3–176 *and* 103, pp. 3–127; *see also* Weinstein Report, Doc. 30–1, pp. 3–18).

Dr. Swanson is a Louisiana-licensed psychologist who received her Ph.D. from LSU in 1999. (Swanson Curriculum Vitae, Doc. 30–1, pp. 31–39; Swanson Testimony, Doc. 106, p. 19). Before receiving her Ph.D., Swanson worked in the mental retardation field for 26 years in various capacities, including work with school districts, teachers, and appraisal teams. (Swanson Testimony, Doc. 106, pp. 20–22). She served on the committee that drafted the Louisiana bill which

eventually became law and created La. C. Cr. P. art. 905.5.1. (*Id.*, pp. 26–27). She was accepted by the Court as an expert in mental retardation and psychology. (*Id.*, p. 31). She created Brumfield's social history by reviewing school, medical, and institutional records. (*Id.*). She then met with Brumfield for 5 hours and reviewed additional evidence submitted by the State in this litigation, including much of the information Dr. Weinstein reviewed. (*Id.*, pp. 31–46). Her testimony sifted through Brumfield's past, emphasized his social history, and ultimately concluded that he is mentally retarded. (*See generally* Swanson Testimony, Doc. 106, pp. 19–237; *see also* Swanson Report, Doc. 30–1, pp. 25–30).

Dr. Merikangas is a physician who received his M.D. in 1969. (Merikangas Curriculum Vitae, Doc. 30–1, p. 45). He is board-certified in the field of neuropsychiatry. (*Id.*, p. 47). He submitted a report which stated that a neurological physical exam of Brumfield did not disclose any acquired brain damage or ongoing disease. (Merikangas Report, Doc. 30–1, p. 42). He did not testify at the hearing.

Dr. Hoppe is a Louisiana-licensed clinical psychologist who received his Psy.D. in 1981. (Hoppe Curriculum Vitae, Ex. S–55). He has maintained a clinical practice for more than 27 years. (Hoppe Testimony, Doc. 103, p. 157). He was admitted by the Court as an expert in clinical and forensic psychology. (Doc. 103, p. 176). He administered an IQ test to Brumfield in addition to reviewing the available records in this case. (*Id.*, Doc. 104, pp. 7–11). He was unable to interview anyone other than Brumfield

because counsel for the State did not provide him with contact information for those persons.[21] (Doc. 104, p. 98, 108). He concluded that Brumfield was not mentally retarded. (*Id.*, pp. 25–26).

Dr. Blanche is a forensic psychiatrist who received his M.D. from LSU Medical School in New Orleans in 1981. (Blanche Testimony, Doc. 104, p. 169). He works part-time as a psychiatrist in the East Baton Rouge Parish jail, where he identifies symptoms of mentally ill persons for treatment. (Doc. 105, pp. 8–11). The Court accepted him as an expert in forensic psychiatry. (Doc. 104, p. 183). He interviewed Brumfield at Angola and reviewed the available records. (Doc. 104, pp. 184–87). He did not interview anyone other than Brumfield, stating that he felt any information gleaned from outside sources would be unreliable.[22] (Doc. 105, p. 31).

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[21] Dr. Hoppe has previously testified in a state court sentencing, which later came before this Court on habeas review, regarding a defense expert's failure to assess collateral sources of information besides the person whose mental status is being evaluated. *See Koon v. Cain*, No. 01–cv–327–JJB (M.D. La. Feb. 1, 2007) Doc. 111 at **13, 26 (slip op.) (unreported), *aff'd*, 277 Fed. Appx. 381 (5th Cir. 2008) (criticizing defense expert Dr. Zimmerman for not obtaining corroborating data from collateral sources regarding defendant's mental health defense). The Court finds Dr. Hoppe's failure (or inability, if counsel for the State was to blame) to "obtain corroborating data from collateral sources" in this case renders his testimony here suspect.

[22] Dr. Blanche's reticence to speak with members of Brumfield's family and others who knew him might have arisen because, as a State expert, he might be perceived as hostile to Brumfield's interests and thus might receive inaccurate information. Nonetheless, his failure to even make an attempt at corroborating

Until his deposition in this case in January 2010, Dr. Blanche had never heard of the AAMR/AAIDD and was thus unfamiliar with its diagnostic definitions. (Doc. 104, p. 182; Doc. 105, p. 11). In his work for the jail and in his general practice, he refers persons suspected of mental retardation to a psychologist. (Doc. 105, pp. 7–9). Dr. Blanche received no formal training in administering psychological testing. (Doc. 104, p. 181); *see also State v. Corey Williams*, 831 So. 2d 835, 859 (La. 2002) (cautioning courts to not appoint physicians to assess mental retardation because they do not possess the "appropriate expertise"). He concluded that Brumfield does not suffer from mental retardation. (Doc. 104, p. 218).

Dr. Bolter is a clinical neuropsychologist who received his Ph.D. from the University of Memphis. (Bolter Testimony, Doc. 107, pp. 3–5). Since 1988 he has worked at the Neuromedical Center in Baton Rouge. (Doc. 107, p. 3). During Brumfield's murder trial in state court in 1995, he submitted an expert report for the defense and testified at the sentencing phase of Brumfield's trial. (Transcript of Sentencing Phase, Vol.

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his observations by cross-checking with collateral sources is of fundamental import. The AAIDD guidelines make clear that, especially in forensic diagnosis situations, a holistic review of petitioner's mental status must include these assessments. (*See* User's Guide to 10th Edition, Ex. P–13, pp. 18–22). Ratings by peers, teachers, family members, and others in the subject's community environment are considered crucial. (*Id.*). Dr. Blanche's failure to do so entitles his testimony to comparably less weight than Dr. Weinstein's and Dr. Swanson's, both of whom gave due consideration to the clinical guidelines in this regard.

XVI, pp. 3902–10). Dr. Bolter's records were subsequently destroyed, and he remembered little about Brumfield. (Doc. 107, pp. 13–21). As a result, the Court admitted Bolter as an expert in neuropsychology but restricted questions to the scope of his 1995 report. (Doc. 107, pp. 19–20; *see also* Bolter Report, Exs. S–39 *and* P–33). Based on his 1995 report, Bolter found nothing in the report to suggest petitioner was mentally retarded. (Doc. 107, pp. 36–37).[23]

B. Prong 1: Significant Limitations in Intellectual Functioning

The AAIDD recognizes that because "intelligence is best conceptualized and captured by a general factor of intelligence," (10th Edition, Ex. P–11, p. 55), an assessment of intellectual functioning requires "reliance on a general functioning IQ score...." (*Id.*, p. 51). There is no federally-established, bright-line cutoff for persons to qualify as mentally retarded, even using an objective IQ test as the measure for the intellectual functioning prong. *See Atkins*, 536 U.S. at 308–09, n.3, 122 S. Ct. 2242 ("'Mild' mental retardation is *typically* used to describe people with an IQ level of 50–55 *to approximately 70.*") (citing Diagnostic and Statistical Manual of Mental Disorders 42–43 (4th ed. 2000)) (emphasis added); *id.* at 309, n.5, 122 S. Ct. 2242 ("*[A]n IQ between 70 and 75 or lower ... is typically considered*

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[23] This Court respects Dr. Bolter and found his testimony to be credible, but due to his limited records and memory, his testimony does not shed much light on the issues before the Court, especially because his assessment was not an *Atkins*-tailored inquiry. *See infra*, Part II.D.

the cutoff IQ score for the intellectual function prong of the mental retardation definition.") (citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)) (emphasis added).

Nor does any codified portion of Louisiana law provide for a numerical cutoff. Louisiana cases have never explicitly found a bright-line cutoff and have consistently rejected imposition of one. E.g., *State v. Shedran Williams*, 22 So. 3d 867, 888 (La. 2009) ("[N]either our legislature nor our jurisprudence has set forth a specific IQ score for determining intellectual functioning in the capital sentencing context...."). The cases which have rejected *Atkins* claims based on IQ scores have done so, not simply because of the IQ score, but because other factors relevant to assessing intellectual functioning also pointed toward a finding of non-retardation. Moreover, those cases have arisen from direct review of a jury's rejection of a mental retardation claim. For instance, in *Shedran Williams*, 22 So. 3d at 888, the defendant had a full scale score of 73 on the WAIS–R test. *Id.* at 888, n.16. The defendant contested the jury's finding of non-retardation on direct review, alleging that the expert testimony of Dr. Hoppe (incidentally, the same expert used by the State in this case) that the ceiling IQ for mild mental retardation was 70 was legal error. *Id.* at 887. The Court declined to find error in the jury's determination because the jury could also have reasonably found he flunked the adaptive skills prong. *Id.* at 888. The Court also noted that the defendant failed to present to the jury how the standard error of measurement might

impact the full scale IQ score. *Id.* at 888, n.16. In *State v. Dunn III*, 41 So. 3d 454, 470 (La. 2010), the court stated that "scores of 75 brush the threshold score for a mental retardation diagnosis" but ultimately did not disturb on direct review the jury's finding of non-retardation. *See also State v. Lee*, 976 So. 2d 109, 146 (La. 2008) (holding that Dr. Hoppe's explanation of "an average IQ as a child of 75.5" as "well over the clinical definition of mild retardation" did not ultimately result in an irrational or unreasonable jury finding of non-retardation).

Mental health literature published by the AAIDD has admonished practitioners to avoid imposition of cutoff IQ scores as well, with the current edition noting that 70–75 is the upper range for mild mental retardation. (10th Edition, Ex. P–11, pp. 57–59). Because the Court has found the 10th Edition is the proper source to follow in construing Louisiana's definition of mental retardation, the Court therefore finds that, consistent with Louisiana statutory and case law, an IQ score of 75 or below does not preclude a finding of mild mental retardation for *Atkins* purposes.

In this case, Brumfield took four different IQ assessments and received the following unadjusted, full scale scores, as reported by petitioner's experts:

- In a 1995 WAIS–R test administered by then-defense expert Dr. Bolter, he scored a 75, with a 95% confidence interval of 70–80.
- In a 2007 Stanford–Binet V test administered by petitioner's expert, Dr. Weinstein, he scored a 72, with a 95% confidence interval of 69–77.

- In a 2007 C–TONI test administered by Dr. Weinstein, he scored a 70, with a 95% confidence interval of 65–75.
- In a 2009 WAIS–IV test administered by the State's expert, Dr. Hoppe, he scored a 70, with a 95% confidence interval of 67–75.[24]

(Summary of Brumfield's IQ Scores, Petitioner's Ex. 3).[25]

Standing alone, these scores appear to meet prong one of the mental retardation test. In Wechsler-scaled tests (such as WAIS–R and WAIS–IV), the standard deviation is 15 and the mean is 100, meaning that 70 represents the score best approximating the cutoff for qualifying under the clinical definition of significantly limited intellectual functioning. *Dunn III*, 41 So. 3d at

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[24] Suspecting that Brumfield may have not put forth his best effort, Dr. Hoppe gave him a Rey malingering test, which is designed to identify such a situation. Brumfield scored well within the normal range, though Dr. Hoppe still asserts Brumfield somehow outsmarted the malingering test. (Hoppe Testimony, Doc. 104, p. 16). Given the consistently close scores on the IQ tests and the testimony from Dr. Weinstein that such consistently low and close scores could only be accomplished through malingering by a genius — a label manifestly inappropriate for Brumfield — the Court cannot credit Dr. Hoppe's testimony on this issue. The Court therefore finds the 2009 score of 70 on the WAIS–IV test to be valid.

[25] The Court notes that one IQ score listed on the summary chart exhibit was found unreliable because the PPVT test only made an IQ estimate, and thus it cannot be taken into account in assessing Brumfield's intellectual functioning. (Weinstein Testimony, Doc. 102, pp. 117–18).

461–62. The Stanford–Binet V test, unlike previous versions of that test, uses the same measuring guideposts as the Wechsler tests; thus, scoring a 70 on that test would best approximate intellectual functioning two standard deviations removed from the mean. *Id.* Brumfield's scores consistently show him scoring between 70 and 75 on various IQ tests, a range which falls squarely within the upper bounds of mild mental retardation according to the AAIDD's clinical definition.

Every expert that has testified in this matter has admitted that Brumfield meets the intellectual functioning prong of the mental retardation test as set forth in La. C. Cr. P. art. 905.5.1(H)(1). (Greenspan Testimony, Doc. 101, pp. 34, 60–66; Weinstein Testimony, Doc. 102, p. 50; Swanson Testimony, Doc. 106, pp. 49–50; Hoppe Testimony, Doc. 104, p. 71; Blanche Testimony, Doc. 105, pp. 19–20; *see also* Bolter Testimony, Doc. 107, p. 43 (admitting an IQ of 75 qualifies as the upper bound of mild mental retardation)). Nor does the State assert in its briefing that Brumfield fails to meet this part of the test.

Even though all of Brumfield's IQ scores, when assessing the standard error of measurement, show him to potentially be mentally retarded using even the stricter cutoff of 70, courts have sometimes been hesitant to reach into the lower bounds of the standard error of measurement (sometimes referred to as the "margin of error") to make a finding of mental retardation. *See, e.g., Moore v. Quarterman*, 342 Fed. Appx. 65, 80, n.23 (5th Cir. 2009) (Smith, J., dissenting) (asserting that a preponderance standard cannot be

satisfied under Texas law's IQ cutoff of 70 when a petitioner shows an average IQ score above 70, regardless of the standard error of measurement). Crucially, though, Brumfield's full, scaled IQ scores cited above do not take into account the "Flynn Effect." Those unadjusted IQ scores already qualify him as, at a minimum, on the borderline of mild mental retardation, a showing which alone permits inquiry into the second prong under Louisiana's flexible-cutoff approach. *See Dunn III*, 41 So. 3d at 470 (noting that persons with IQ scores above 70 can nonetheless be diagnosed as mentally retarded by heavily depending on a showing of substantial impairment of adaptive functioning). Applying the Flynn Effect to Brumfield's scores would indisputably place him within the range of mild mental retardation.

This phenomenon, named after political scientist James Flynn, found that, over time, the mean IQ scores of the American public on any given test increase by approximately 3 points per decade, or an average of approximately 0.30–0.33 points per year. Flynn measured this increase by simply giving an individual two tests, one of which was an older IQ test that had been normalized to the public at the time of its publishing and one of which was a newly-normalized, recently-published test. Test subjects consistently performed better on the older test than the newer test, leading to the theory that the public on average becomes more intelligent — at least as reflected in mean IQ scores — as times passes. Thus, when an older test is used to measure a test subject, the subject's IQ score may be artificially inflated because that test was

normalized using a past sample of Americans. Since the general public's IQ scores have since risen, measuring someone against an older set of norms means measuring someone against a norm set that does not currently reflect the average IQ today, requiring a downward adjustment of the subject's score to account for the subsequent IQ rise of the public which the older test itself does not capture. (*See, e.g.*, User's Guide to 10th Edition, Ex. P–13, p. 20, ¶ 4; *see also* Frank M. Gresham, *Interpretation of Intelligence Test Scores in* Atkins *Cases: Conceptual and Psychometric Issues*, 16 Applied Neuropsychology 91, 93–94 (2009), Ex. P–9; Gilbert S. Macvaugh, III & Mark D. Cunningham, *Atkins v. Virginia: Implications and recommendations for forensic practice*, 37 J. of Psychiatry & Law 131, 148–151 (2009), Ex. P–10).

The Flynn Effect has been widely accepted as a fact in the scientific community, though explaining the cause of this phenomenon has proven more difficult. (Kevin S. McGrew, *Is the Flynn Effect a Scientifically Accepted Fact?*, Institute for Applied Psychometrics (2010), Ex. P4). Moreover, courts have struggled to determine whether the Flynn Effect should be applied to individual scores and/or whether it should be applied differently depending on the test administered. Neither the Fifth Circuit nor the Louisiana Supreme Court has determined whether to accept the Flynn Effect as a valid method. *See In re Mathis*, 483 F.3d 395, 398, n.1 (5th Cir. 2007) (mentioning that the Flynn Effect has not been accepted as scientifically valid within the Fifth Circuit); *In re Salazar*, 443 F.3d 430, 433, n.1 (5th Cir. 2006) (expressing no opinion on validity of Flynn

Effect); *Dunn III*, 41 So. 3d 454, 470, n.16 (La. 2010) (noting that the Flynn Effect had not been specifically accepted as scientifically valid by the Louisiana Supreme Court); *see also Dunn III*, 41 So. 3d at 478–79 (Knoll, J., concurring) (asserting that the Flynn Effect should not be applied to individual IQ scores but that use of outdated tests may be taken into account when making *Atkins* determination).

In the face of this legal uncertainty, the Court gives great weight to the AAIDD's clinical standards, which tip the balance in favor of at least considering the Flynn Effect, even if the Court does not fully embrace all of its contours. *See Wiley v. Epps*, 668 F. Supp. 2d 848, 894–95 (N.D. Miss. 2009), *aff'd*, 625 F.3d 199 (5th Cir. 2010) (assessing Flynn Effect holistically as a factor to consider in analyzing IQ scores). The AAIDD's User Guide specifically instructs practitioners to apply the Flynn Effect, especially when presented with a retrospective diagnosis situation, as is the case here. (User's Guide to 10th Edition, Ex. P–13, pp. 17–21). Applying the Flynn Effect would lower Brumfield's 1995 WAIS–R score from 75 to 70, his 2007 StanfordBinet V score from 72 to 70, and his 2007 C–TONI score from 70 to 65.[26] (Summary of IQ Scores, Ex. P–3). Thus, the Flynn Effect would place those scores solidly and indisputably into the mildly mentally retarded level.

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[26] No computation of the Flynn Effect on his 2009 WAIS–IV score of 70 was made, but that is unnecessary because that score already undoubtedly qualifies as showing mild mental retardation.

Given that (1) every single testifying expert — both petitioner's and the State's — agrees that Brumfield has satisfied the intellectual functioning prong, (2) the unadjusted IQ scores permit inquiry into the other parts of the test under Louisiana's flexible-cutoff approach, and (3) the Flynn Effect-adjusted scores place all of Brumfield's IQ scores at or more than two standard deviations below the mean, the Court finds Brumfield has met his burden and shown by a preponderance of the evidence that he has significant limitations in intellectual functioning. Prong One is met.

C. Prong Two: Significant Limitations in Adaptive Behavior as Expressed in Conceptual, Social, and Practical Adaptive Skills

Prong Two involves an assessment of Brumfield's adaptive skills in the areas of conceptual, social, and practical skills. He must show a significant limitation in at least one of those three domains to satisfy the adaptive skills prong. (*See* 10th Edition, Ex. P–11, Table 1. 2, p. 14). The AAIDD's 9th Edition defined significant limitation in adaptive skills as someone who exhibited deficits in at least two of the following ten areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. (*Id.*, Table 2.1, p. 21). The 10th Edition moved away from that scheme of categorization, instead forming three clusters of related skills and requiring a significant limitation in one of those broader domains. (*Id.*, Table 5.2, p. 82).

Conceptual skills include language skills, reading and writing abilities, self-direction, and grasping

concepts of money. (*Id.*). These conceptual skills may be collectively labeled as functional academics. (*Id.*).

Social skills focus on interpersonal relationships, responsibility, self-esteem, gullibility/naivete, following rules/obeying laws, and avoidance of victimization. (*Id.*).

Practical skills focus on self care and daily living. (*Id.*). Such skills include preparing and eating meals, dressing, toileting, personal mobility and use of transportation, occupational skills, health care, and maintenance of safe environments. (*Id.*, Table 3. 1, p. 42).

The AAIDD prefers that practitioners utilize standardized testing in these areas, and like the intellectual functioning prong, a showing of significant limitation requires a score two standard deviations below the mean. (*Id.*, p. 76). However, in retrospective diagnosis situations, it is often difficult to assess such limitations simply by giving a subject and his inner circle a questionnaire to fill out. (User's Guide to 10th Edition, Ex. P–13, p. 17). Rather, the guidelines in this situation call for additional inquiry into the subject's past, including interviews alongside questionnaires. (*Id.*, pp. 18–22).

In this case, Brumfield and several people who knew him well were given ABAS–II questionnaires by Dr. Weinstein in 2007 and 2009 in an effort to obtain relatively objective measures of Brumfield's adaptive skills. (ABAS–II Questionnaires and Results, Petitioner's Exs. 48–52). However, Weinstein explained that the scores on the ABAS tests could not be given

preclusive effect in assessing Brumfield's adaptive skills and cautioned that they might not be wholly reliable. (Weinstein Testimony, Doc. 102, p. 59). Depending on the person, these tests sought input as to Brumfield's past ability in his childhood to perform certain tasks. Brumfield was born on January 7, 1973, and these backward-looking questions rely principally upon the memories of the test-takers regarding Brumfield's abilities dating back 15–20 years. Some of them have emotional incentive to lie or exaggerate (such as Brumfield's mother, sister, and his child's mother) in order to spare him the penalty of execution. Others, such as Brumfield's former teacher, may or may not have a clear recall of events since he was only one of many hundreds of students she taught over her career. Brumfield does not rely on these scores in his briefs, the State does not either, and in any event the guidelines for retrospective diagnoses of mental retardation eschew total reliance on this type of information in favor of interviewing relevant persons with knowledge of petitioner and cross-checking that information with school records, social history, and other more objective indicia. (User's Guide to 10th Edition, Ex. P13, pp. 18–22). The Court finds these tests to be of little or no value and therefore will not address the results of the ABAS–II exams.[27]

Without reliable standardized measures available, the Court must rely on the testimony of the expert witnesses and their reports, the Court's independent

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[27] For whatever they are worth, the scores showed Brumfield with very significant adaptive deficits.

evaluation of Brumfield's social, educational, medical, and criminal histories, and a common sense appraisal of Brumfield's actions and abilities. In this regard, several considerations stressed in the clinical literature bear repeating. As the AAIDD's operational assumptions make clear, "people with mental retardation are complex human beings" who may have "strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." (10th Edition, Ex. P–11, p. 8). Thus, diagnosis of mental retardation "is ruled in by areas of impairment but is not ruled out by areas of competence." (Greenspan Testimony, Doc. 101, p. 75). Mental retardation is essentially a disorder of thinking rather than learning. (*Id.*, pp. 40–41). Breakdowns in routine require higher-level problem-solving abilities and critical thinking skills that even mildly mentally retarded persons often lack. (*See id.*). Mentally retarded persons can read and write but usually only up to a fifth or sixth grade level. (*Id.*, p. 43). Mildly mentally retarded persons have mental abilities of seven to eleven year old children. (Summary of American Psychological Association's Characteristics of Mildly Mentally Retarded Individuals, Ex. P–60)

While "[a]daptive behavior is considered to be conceptually different from maladaptive or problem behavior," it is nonetheless important to recognize "that the function of inappropriate, or maladaptive, behavior may be to communicate an individual's needs, and in some cases, may even be considered 'adaptive.'" (10th Edition, Ex. P–11, p. 79). The Court must take into account the retrospective diagnostic guideline admonishing practitioners to "not use past criminal

behavior or verbal behavior to infer level of adaptive behavior," (User's Guide to 10th Edition, Ex. P–13, p. 22), because "adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum." (*Id.*, p. 20). The reasons for not using maladaptive criminal behavior to assess adaptive skills are several: (1) the defendant may have gullibly acted under the direction or training of a confederate during the crime; (2) there may not be available enough accurate details about the facts of the crime from which to draw adaptive conclusions; and (3) in any event, there is a lack of normative information about actions during and following crimes to be able to meaningfully assess whether and how much a defendant's actions deviated from the mean adaptive behavior during criminal acts. (*Id.*; Greenspan Testimony, Doc. 101, pp. 121–26; Swanson Testimony, Doc. 106, pp. 117–23).

On the other hand, the Court must also remain cognizant of the propensity of Louisiana courts to take such maladaptive criminal behavior into account when discussing the adaptive skills prong of the mental retardation test. The Louisiana Supreme Court has in several instances discussed the criminal actions of an *Atkins* petitioner when assessing that person's adaptive skills.

In *State v. Brown*, 907 So. 2d 1, 45–47 (La. 2005), the Louisiana Supreme Court examined on direct review the defendant's actions immediately following the crime, including destruction of evidence, in light of defendant's contention that a gunshot incurred by him in a previous criminal episode damaged his brain's frontal and temporal lobes and deprived him of his

ability to make reasonable choices. The *Brown* Court rejected defendant's contention in light of the fact that no expert testified that he was mentally retarded. *Id.* at 46–47. In *State v. Scott*, 921 So. 2d 904, 959 (La. 2006), *overruled in part on other grounds by State v. Dunn II*, 974 So. 2d 658 (La. 2008), the Court on direct review succinctly noted that "the defendant's behavior during and following the commission of the crime can be relevant to the determination of mental retardation." In *State v. Lee*, 976 So. 2d 109 (La. 2008) the Louisiana Supreme Court evaluated on direct review "[t]he complexity, scope, planning, and relative skill with which defendant committed" his crimes as evidence of strength in adaptive skills. 976 So. 2d at 147. In *State v. Anderson*, 996 So. 2d 973, 991 (La. 2008), the Louisiana Supreme Court, like in *Brown*, analyzed on direct review the evasive steps defendant took in the wake of committing the charged crime, noting that "[s]uch organized behavior to cover his tracks, suggests a level of intellectual awareness of right from wrong, and could have formed the basis for the jury to determine that defendant's adaptive skills were not retarded." In *State v. Shedran Williams*, 22 So. 3d 867 (La. 2009), the Louisiana Supreme Court found that the jury could have discredited the defense's expert witness because he failed to interview eyewitnesses to the crime who might have had an opinion on the defendant's behavior prior to and during its commission. 22 So. 3d at 885.

Notably, all five of these cases — *Brown*, *Scott*, *Lee*, *Anderson*, and *Shedran Williams* — affirmed on direct appeal a jury's assessment of death in the penalty phase of trial where the mental retardation issue was

actually litigated. The difference in procedural posture between those cases and this case is not insignificant. When the Louisiana Supreme Court directly reviews a jury's death sentence verdict, it does so under the standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court to assess whether any rational factfinder, when viewing the evidence in the light most favorable to the prosecution, could conclude that the defendant failed to prove by a preponderance of the evidence that he was mentally retarded. *See Shedran Williams*, 22 So. 3d at 881–82. Because the Louisiana Supreme Court was tasked in those cases with affirmatively searching for reasons to uphold a jury verdict if they existed — meaning that expert testimony was construed wholly in the State's favor and against the defendant — it was obviously entitled to make an adaptive skill assessment based on potential juror inferences from the facts of the crime itself.

State v. Dunn (III), 41 So. 3d 454 (La. 2010), is the only Louisiana Supreme Court case on point with a procedural posture comparable to this one.[28] That Court found that it was "important to consider the defendant's behavior during the planning and commission of the instant crime," 41 So. 3d at 471, when the plan showed "premeditative aspects" and that the defendant lacked "the impulsiveness and non-leadership interactions associated with mentally

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[28] Dunn had been convicted of capital murder but, after *Atkins*, his retardation claim was decided by a state trial judge after several days of hearings. 41 So. 3d at 457–58.

retarded persons," at least when the trial evidence showed those skills to be "firmly established facts...." *Id.* at 472. While the Court admitted that showing weaknesses "of some adaptive skills ... would not necessarily preclude a finding of mild mental retardation," it ultimately affirmed the trial judge's determination that the defendant had not met his burden to show mental retardation. *Id.* at 472–73.

A fair-minded reading of *Dunn III* establishes that courts certainly should consider evidence of the criminal action in the overall assessment if "firmly established facts" show clear instances of premeditation and leadership which tend to preclude, for instance, the possibility that the petitioner gullibly followed the direction of another or relied on impulse rather than a plan. These directives are not inconsistent with the 10th Edition's recognition that maladaptive criminal actions can in some rare instances be considered adaptive behavior. However, as Dr. Greenspan noted, because there are few studies showing normative behavior during commission of a crime, courts must be wary of drawing conclusions from those actions alone. *Dunn III* was a rare case where those circumstances were met. However, far from establishing a categorical imperative that courts must give great weight to petitioner's actions during the crime, *Dunn III* simply supports giving a court discretion to consider those facts when and if they are relevant to a particular adaptive skill. *Dunn III*, 41 So. 3d at 471 (stating that "the defendant's behavior during and following the commission of the crime *can* be

relevant to the determination of mental retardation") (quoting *Scott*, 921 So. 2d at 959) (emphasis added).

Ultimately, the State's position seems to be that the facts of the underlying crime compel a finding of non-retardation. That position does not comport with the clinical guidelines. While it is true that the Louisiana Supreme Court has at times taken the criminal facts into account (notably, only when the jury or, in one case, the judge found non-retardation), that Court has never repudiated the clinical guidelines; indeed, it has consistently endorsed them. The main thrust of Louisiana jurisprudence on this issue does not cabin a court's discretion in derogation of the clinical guidelines. In assessing the weight to be given the criminal facts, this Court lends great credence to the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business. As will be shown below, on the facts presented here, the criminal facts the State relies on are entitled to relatively little weight.

With these important precepts in mind, the Court must endeavor to navigate the murky waters of adaptive skills. While both Dr. Weinstein and Dr. Swanson testified regarding Brumfield's adaptive skills, only Dr. Blanche made determinations as to Brumfield's adaptive skills. (Hoppe Testimony, Doc. 106, p. 68 (asserting that Dr. Blanche was focusing on the adaptive skills prong while he focused on the intellectual functioning prong); Blanche Testimony, Doc. 105, p. 29 (asserting that his sole focus was on the adaptive skills prong)). As previously discussed, Dr. Blanche's failure to adhere to the AAIDD's clinical

standards must be taken into account when assigning credit to the often-conflicting testimony.

1. *Conceptual Skills*

The first category of adaptive skills to be considered is the realm of conceptual skills, which includes language skills, reading and writing abilities, self-direction, and grasping concepts of money, which may be collectively labeled as functional academics. (*See* 10th Edition, Ex. P–11, p. 82). Functional academics are concepts used in the real world rather than in the classroom. (Greenspan Testimony, Doc. 101, pp. 72–73).

Brumfield's writing abilities are severely limited. While this limitation is partially related to his lack of motor skills in this particular area, the Court heard testimony that he must use a piece of cardboard to write in a straight line, that he cannot write freehand, and that he takes an inordinate amount of time to write a simple, one-page letter. (Weinstein Testimony, Doc. 102, pp. 72–73). Brumfield requires assistance from other death row inmates to write his letters, (*id.* at 78–79), and thus the reliance by the States' experts on the quality of his expressions in his prison correspondence is misplaced. (*See also* Letter from Brumfield to Richard Donald dated March 16, 2010, Ex. P–24 (referencing "the guy that helps me with my letters"); Swanson Testimony, Doc. 106, p. 93–99 (referencing teacher who let Brumfield copy things during class with aid of cardboard piece and testifying generally to Brumfield's writing limitations)).

The State does not contend that Brumfield has adequate reading abilities. Dr. Swanson listened to

Brumfield read some of the letters he wrote and found that his reading was on a fourth grade level. (Doc. 106, p. 104). The reading materials in his prison cell are targeted to middle school audiences and are consistent with someone who has mental retardation. (*Id.*, pp. 100–106).

Brumfield has a dismal record of academic accomplishments in the classroom. Although Brumfield was always behind in school due to his developmental delays (Weinstein Testimony, Doc. 102, p. 69), his progress stalled completely in middle school. He reached a plateau somewhere between the fourth and sixth grade, which is where mildly mentally retarded individuals generally fall. (Swanson Testimony, Doc. 106, p. 86). Although Brumfield was never held back, his teachers were insistent that he not be promoted, but the principal gave him a "social promotion." (Swanson Testimony, Doc. 106, pp. 73–74). School testing records show lack of competence in virtually every area. In eighth grade, Brumfield tested two standard deviations below his age group in standardized testing — he read at the third grade level, did math at the third grade level, and wrote at the fourth grade level. (Swanson Testimony, Doc. 106, p. 85). His prior testing during the fifth grade revealed similar deficits. (*Id.*, pp. 68–71).

Because of Brumfield's severe academic challenges, his teachers and school officials attempted to identify the problem(s) with his learning. Unfortunately, he was constantly shuttled between different schools and remained periodically in-and-out of mental health centers and special education classes beginning in the

fifth grade. (*See* East Baton Rouge Parish Schools Pupil Appraisal of Kevan Brumfield, Ex. P–27). A constant refrain of the teacher and specialist assessments was his need for a highly structured environment in order to provide the necessary supports for him to function. (*See* Brumfield School Records, Ex. P–27). In all, Brumfield attended 14–15 schools prior to eventually dropping out in 1989 at age 16. (LeGuin's Report on Brumfield's Social History, Ex. S–37, p. 21). During the period from January 1984 to May 1989 when Brumfield was in special education, he was placed in at least 10 different schools. (Swanson Report, Doc. 30–1, p. 26).

In response, the State essentially argues that Brumfield's lack of prior mental retardation diagnosis forecloses a retrospective diagnosis based on the level of attention his mental health received during his formative years. Brumfield concedes that Dr. Weinstein was the first person to diagnose him with mental retardation, despite prior testing to determine the genesis of his academic and behavioral problems. (Weinstein Testimony, Doc. 102, p. 108). The State argues that the diagnoses during Brumfield's school years — conduct disorders, under-socialization, and aggressiveness — show a conspicuous lack of mention of mental retardation, which should preclude a retrospective diagnosis at this point in time. But Dr. Swanson adequately rebutted this *expresio unius*-like argument. In the late 1970s and early 1980s, black male students were being disproportionately diagnosed as mentally retarded. This apparent over-diagnosis problem caused an overcorrection by school officials,

who were cautioned not to over-represent that demographic by instead diagnosing them with a related disorder that would avoid the mental retardation label but still allow for the same level of educational services to be provided that individual student. (Swanson Testimony, Doc. 106, pp. 51–60). As the User's Guide makes clear, political correctness and worry about negative stigmatization has often played a role in preventing prior diagnosis of mental retardation. (Ex. P–13, p. 18). Because the school appraisal teams might have looked past factors pointing toward Brumfield's mental retardation in favor of diagnosing him with more politically palatable ailments, like conduct disorders and behavioral problems, the Court refuses to treat his lack of prior diagnosis as preclusive.[29] Moreover, Brumfield never previously underwent testing aimed specifically at determining mental retardation. A lack of mental retardation diagnosis in the face of *general* aptitude and behavioral testing differs in kind from an affirmative non-diagnosis in light of *specifically tailored* testing for mental

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[29] Article 905.5.1(H)(2) likewise does not preclude a finding of mental retardation even if the symptoms exist in tandem with other related disorders. Moreover, the clinical literature recognizes that mildly mentally retarded individuals often suffer from many of the same disorders listed in article 905.5.1(H)(2). (User's Guide to 10th Edition, Ex. P–13, pp. 15–16). Thus, contrary to the State's contention, prior diagnosis of other, related mental health disorders, like the undersocialized, aggressive conduct disorder diagnoses from this childhood (*see* Doc. 104, pp. 130–36), do not preclude and could be consistent with mental retardation.

retardation, which Brumfield never received until this case commenced.

The State also points to several practical facts which it asserts show Brumfield's functional academic skills were not grossly deficient in the area of conceptual skills. Dr. Blanche notes that Brumfield must have had a basic grasp of economic and monetary concepts because he left his job as a restaurant cook to make more money selling drugs. (Doc. 104, pp. 210–212). Both Dr. Hoppe and Dr. Blanche talk about the multi-tasking skills needed to deal drugs, including an ability to avoid police detection, to count money, and to ascertain the correct amount of drugs to distribute in each deal. (Hoppe Testimony, Doc. 104, pp. 41–42; Blanche Testimony, Doc. 104, pp. 210–12). Common sense dictates that those are certainly traits that "successful" drug dealers should possess. But did Brumfield actually possess those traits? The record is barren of any testimony regarding his efficacy in drug transactions. Perhaps he guesstimated what amounts of drugs were sufficient for the price a customer was willing to pay. Perhaps he had others count the money for him or divide the drugs into set quantities for sale at a set price. Or perhaps Brumfield was actually a savvy drug merchant. The point is that we simply have no testimony establishing what Brumfield did or did not do well during his drug dealing days. Nothing in the record shows that Brumfield actually exhibited traits consistent with being a "successful" drug dealer, making the State expert's theorizing about Brumfield's

success dealing drugs inadequate to show an adaptive strength in this regard.[30]

Blanche elaborated on other perceived adaptive skills, including Brumfield's "ownership" of a car, his cash transactions in renting motel rooms, and his contributions to his girlfriend. (Blanche Testimony, Doc. 104, pp. 213–15). These assertions have more solid factual foundation. There is no dispute that Brumfield acquired a car prior to and in connection with the crime, though the record shows that rather than owning the car, he simply used his access to drugs to barter for its use — a "street rental." (Doc. 103, p. 27). In any event, this testimony, even if accepted at face value, does not negate the possibility that Brumfield had significant deficits in the domain of conceptual skills. It is a truism of mental retardation analysis that strengths may coexist alongside weaknesses. Even if Brumfield was able to conduct a transaction for a motel room or operate a car, those skills are not inconsistent with mental retardation. Blanche himself conceded that, based upon his interview, Brumfield had skills and knowledge equivalent to a ten-year-old child. (Doc. 105, pp. 52–55). Mildly mentally retarded people generally have mental ages ranging from seven to eleven. (Summary of American Psychological Association's Characteristics of Mildly Mentally Retarded Individuals, Ex. P–60). It is not inconceivable for someone around the age of ten to have the mental

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[30] In fact, it appears that Brumfield operated as a street drug dealer selling nickel and dime bags provided to him. (Doc. 104, pp. 41–43).

capacity to conduct a relatively simply economic transaction like renting a room, especially if receiving help from another source like a girlfriend.

The ABAS–II scores, for what they are worth, consistently show that Brumfield's lowest assessed scores are in the area of functional academics. (*See* ABAS–II scores, Exs. P–48–52). Dr. Swanson unequivocally testified that Brumfield had significant deficits in the area of functional academics and that he was significantly impaired in the area of conceptual skills as defined by the AAIDD. (Doc. 106, pp. 129–30).

The State counters with two arguments: first, it points to Brumfield's videotaped confessions, which it asserts show a poised, manipulative person with at least average adaptive functioning; and second, that the facts of the murder for which Brumfield was convicted show that Brumfield had the ability to premeditate and lead a heinous crime.

Brumfield's confessions show composure and clear answers to direct questions. (*See* Brumfield Confession Tapes, Exs. S–15, S–17). But as Dr. Swanson correctly identified, during his first interrogation, Brumfield deliberately lied about his educational achievements and therefore masked his deficits by stating he graduated from high school and made "As and Bs" throughout school; in reality, of course, he achieved neither. (Doc. 106, p. 106). Swanson testified that the first confession tape shows he acquiesced to answers that were cued and prompted by his questioner. (*Id.*, p. 107). In the second taped confession, because it appears Brumfield had been discussing the topic for a longer period of time, his responses were quicker in taking his

questioner's cues and also longer because he had practiced speaking on the topic already. (*Id.*, p. 108). These traces of suggestibility are consistent with mental retardation, according to Dr. Swanson. (*Id.*, pp. 109–112). Even without wholly accepting Dr. Swanson's theory of his confessions — they are undoubtedly legally valid and non-coercive — her testimony is credible, and the Court therefore cannot find the taped confessions to be dispositive evidence on non-retardation, as the State would have it.

A recording of Brumfield's outgoing phone calls from prison (Ex. S–35) shows nothing extraordinary that a normal ten-year-old child could not do.[31] Talking about making purchases online, conversing about sports scores and stats, and the like are simply not sufficient to show adaptive strength in communication abilities. Even so, because strengths can coexist alongside weaknesses, one or two instances of him exhibiting oral communication skills expected of adults could hardly be said to outweigh the other documented adaptive weaknesses in the conceptual domain. As the diagnostic guidelines state, "adaptive behavior refers to typical and actual functioning and not to capacity or

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[31] For the same reasons, the Court finds Brumfield's conversation with Warrick Dunn, the victim's son, not particularly probative. The fact that Brumfield knew some of his football stats and what some of his siblings were doing shows only that Brumfield anticipated and prepared for the meeting, which occurred in the highly-structured prison environment. But it must be noted that Dunn's willingness to confront and, ultimately, forgive his mother's killer shows remarkable bravery.

maximum functioning." (User's Guide to 10th Edition, Ex. P13, p. 20).

Finally, Brumfield's actions during and immediately following the underlying murder for which he was convicted must be discussed. In many cases, criminal actions will more readily be applicable to social and practical skills than conceptual skills. Capital murder is the only offense where *Atkins* becomes relevant, and in large part these acts of violence show competence in the criminal's ability to manipulate weaponry and other machinery, such as cars. While evading police and avoiding capture can exhibit raw physical skills, at other times those acts are just as consistent with primal survival instincts as they are with callous, cold-blooded calculation. Such an instance would not, of course, excuse the act itself or its aftermath in any way, but in a certain factual context it might place the evasion into a different category for purposes of evaluating adaptive skills. As noted above, it is only the rare case where there will be firmly established facts from a criminal episode that can establish strengths in adaptive skills. This is especially true when evaluating the language skills and reading and writing abilities that form part of the conceptual domain. In this case, those abilities were not readily implicated by the facts of the crime itself, and therefore the Court must look to the crime for evidence, if any, of conceptual skills in the areas of self-direction and abstract reasoning.

As mentioned above, courts sometimes look to premeditation of and leadership during commission of the crime in affirming non-retardation conclusions based on strengths adaptive skills. In this case,

Brumfield acted along with other confederates in executing their criminal scheme which ultimately left a police officer dead. To briefly recount the facts as contained in Brumfield's confession, Brumfield and his two confederates decided to conduct an armed robbery of a Piggly Wiggly grocery store manager while making a night deposit at a Baton Rouge bank. Brumfield and another lay in wait in some bushes adjacent to the bank. The grocery manager arrived at the bank in a police car with her off-duty escort, Corporal Betty Smothers. Brumfield and his confederate simultaneously emerged from the bushes, with each man firing shots into a side of the vehicle. Brumfield, approaching the driver's side, fired several shots which struck and killed Cpl. Smothers, the driver. His confederate approached the passenger side and fired shots into the vehicle from that direction, but the manager, from the passenger seat, succeeded in driving the car away from the bank. (Second Brumfield Confession Videotape, Ex. S–17). Brumfield was later arrested and gave a false confession minimizing his role, but about 14 hours later he ultimately confessed to his true role in the crime. (*Compare* First Brumfield Confession Videotape, Ex. S–15, *with* Second Brumfield Confession Videotape, Ex. S–17).

The State fails to bring forward firmly established facts showing demonstrable leaderships skills during the crime. One of Brumfield's confederates is currently on death row and does not have a pending *Atkins* claim, suggesting the possibility that Brumfield was gullibly convinced to join in the crime instead of actively planning out its details. Moreover, nothing in

Brumfield's confession makes clear that Brumfield, rather than another of one his confederates, "led" this terrible scheme, and the State in its briefing points to nothing else from his trial record showing a form of criminal leadership sufficient to "firmly establish" that point. Nevertheless, it is true that elements of premeditation and planning were involved. Brumfield admitted to having previously seen other night deposits at the bank occur while he drove around the streets of Baton Rouge looking for potential robbery victims. He also lay in wait in the bushes by the bank for approximately 15 minutes before the victims arrived, demonstrating that he did not rely wholly on impulse to commit the crime. (Second Brumfield Confession Videotape, Ex. S–17). But is this particular instance sufficient to overwhelm the other demonstrated showings of adaptive deficits in conceptual skills? It should not be. As the clinical guidelines admonish, isolated occurrences of adaptive strengths by definition do not show typical functioning levels. Brumfield's confession tapes occur in a highly structured environment at the police station in response to firm and specific questioning. Needless to say, up to that point Brumfield's typical environment selling drugs on the street offered much less structure. While the confession surely shows the underlying facts of the crime, alleviating one of the three primary concerns clinicians have had with using facts from a crime in assessing adaptive skills, those facts themselves fail to demonstrate premeditation or leadership qualities that so surpass the functioning levels of a typical mildly mentally retarded person so as to conclusively establish non-retardation as a matter of law. Moreover, direct

expert testimony from Dr. Swanson established to this Court's satisfaction that those tapes are not inconsistent with a person who has mild mental retardation.

It bears repeating that the posture of this case does not bring Brumfield before this Court on direct review of a jury's imposition of the death penalty following evidentiary presentation on the issue of retardation. Rather, this Court must view, more or less in isolation, whether Brumfield meets the clinical criteria. Dr. Blanche, the State's expert, lacked basic knowledge about the AAIDD's standards until he was deposed in this case shortly before the hearing. Additionally, as the Louisiana Supreme Court has observed, his status as a physician rather than a psychologist harms his credibility because he lacks some of the appropriate expertise to be able to comment on certain diagnostic matters, as his lack of knowledge about the AAIDD shows. *Corey Williams*, 831 So. 2d at 859. Additionally, Dr. Blanche failed to conduct interviews with anyone other than Brumfield himself, which runs afoul of the basic guidelines for retrospective diagnoses. Compared with him, the Court simply found more credible the testimony of Drs. Weinstein and Swanson. While Brumfield's confession tapes may at times show evidence of certain adaptive strengths in the area of language skills, they do not obviate his obvious conceptual deficits. Brumfield's maladaptive behavior in committing felony murder makes him unsympathetic and deserving of the maximum punishment available under the law, but it does not necessarily take away from the other manifested deficits in adaptive skills.

Moreover, the Court cannot accord great weight to the facts of the crime, even though they must be taken into account, because the diagnostic guidelines for assessing maladaptive behavior as a part of adaptive skills have not been sufficiently shown to be present in this case. When courts have reason to doubt that facts from a crime are "firmly established" to show whether the defendant exhibited leadership during or detailed premeditation of a criminal enterprise, following the clinical guidelines (which explicitly forbid use of maladaptive criminal behavior in assessing adaptive skills) provides the surest means of accurate fact-finding. The Court duly takes into account the facts of the crime, but in this posture those facts alone cannot control.

Ultimately, the Court finds that, based on the credibility of petitioner's witnesses combined with the documented problems with the bases of testimony by the State's experts, Brumfield has shown by a preponderance of the evidence that he has significantly limited conceptual skills. When holistically assessing his strengths and weaknesses in the areas of language skills, reading and writing abilities, self-direction, and abstract reasoning, the Court finds that, on balance, the evidence shows he meets the AAIDD's definition of mental retardation with respect to the conceptual domain of adaptive behavior. Prong Two is therefore met since Brumfield has shown a significant deficit in one of the three domains of adaptive functioning.

2. *Social Skills*

Because Brumfield's deficit in conceptual skills satisfies Prong Two of the mental retardation test, the

Court will conduct only a brief review of the other two domains.

Social skills include interpersonal relationships, responsibility, self-esteem, gullibility/naivete, following rules/obeying laws, and avoidance of victimization. Brumfield's interpersonal relationships received little discussion at the hearing. He clearly has skills adequate to attract partners, as he has several children by different women. No showing was made of significant deficits in this factor.

Responsibility was also a factor that did not receive much attention on its own, though this factor ties into the other factor regarding following rules and obeying laws. The Court heard testimony that Brumfield's brother had to do his chores for him as a child because he either forgot to do them or could not perform the tasks assigned. (Weinstein Testimony, Doc. 102, p. 67). The record is replete with instances of Brumfield not following the rules at school, as evidenced by his diagnosis as behaviorally disordered. Of course, the Court would not be making this analysis if Brumfield was able to obey the law. Significant testimony was received regarding his inability to follow even simple instructions and rules of games. (Weinstein Testimony, Doc. 102, p. 69). Even Dr. Blanche admits that this was a deficit. (Blanche Testimony, Doc. 105, p. 40).

Nothing in the record shows that Brumfield suffered a deficit in self-esteem. Indeed, he thought himself above the law, not just with his brazen criminal actions throughout his late adolescence leading up to the murder, but also his statements that he would drive

as fast as he wanted to. (Blanche Report, Ex. S–44, p. 9).

With regard to gullibility and naivete, Brumfield was apparently hoodwinked into attending Camelot College when representatives of that institution came into his neighborhood and said he could obtain a loan to go to school there, (Weinstein Testimony, Doc. 102, pp. 82–83), a fact which Dr. Hoppe essentially concedes. (Hoppe Testimony, Doc. 104, pp. 118–20).

Avoidance of victimization is another factor to which the experts did not devote much time. From the Court's review of the record, Brumfield does not appear to have been particularly susceptible to being victimized. In fact, his attendance at Camelot College notwithstanding, it appears Brumfield used his aggression to insulate himself from attempts to victimize him.

Based on these criteria, Brumfield appears to have strengths in interpersonal relationships, self-esteem, and avoidance of victimization. He has shown some evidence of deficit in the gullibility/naivete factor, and he has unquestionably shown strong evidence of significant deficits with regard to responsibility and following rules/obeying laws. On balance, this domain is a close call, but the Court does not find Brumfield meets the criteria for a significant overall deficit in the domain of social skills.

3. *Practical Skills*

Practical skills represent abilities in self care and daily living, such as preparing and eating meals, dressing, toileting, personal mobility and use of

transportation, occupational skills, health care, and maintenance of safe environments.

The record contains occasional references to Brumfield's poor hygiene in certain respects, but apart from that, no credible evidence suggests he is unable to care for himself in the course of daily living.[32] No showing has been made that he lack the ability to provide himself with meals, dress himself, use the toilet properly, or otherwise lacks modes of personal transportation. Indeed, he has shown his ability to make use of a car by obtaining a "street rental" and operating the car before, during, and after the murder for which he was convicted. Even if his activity during the crime may not have been "typical" as defined in the diagnostic guidelines, Brumfield has made no showing that he lacks these skills.

Occupationally, he was able to work as a cook on a couple of occasions, though his efficacy at that job is unclear. He obtained at least one of those jobs through his girlfriend and only stayed for a few months before moving on to drug-dealing. As previously discussed, he occupational skills at drug-dealing are far from clear, if such skills can even contribute to "gainful employment" as used in the literature.

Little evidence exists regarding Brumfield's health care, though on at least one episode he went to the

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[32] The parties' experts disagree on when Brumfield could first tie his shoes, but the Court finds that fact entitled to little weight when compared to his other demonstrated strengths in the same area.

hospital for treatment of a gunshot wound. (*See* Guin's Social History Report, Ex. S–37, p. 13). Brumfield consciously placed himself in harm's way by dealing drugs and knowingly involved himself with the dangerous and violent situations that lifestyle inherently entails. He thus cannot be said to have maintained a "safe environment."

The Court finds Brumfield has not met his burden of showing he has significant deficits in practical skills.

D. Prong Three: Onset Before Age Eighteen Based on Etiology

The third prong requires that the deficits in intellectual functioning and adaptive skills exhibit themselves before the petitioner reaches adulthood. Etiology is the study of causative factors that put persons at risk for diseases, including mental retardation. Because etiology ties in to the timing of the onset of mental retardation, some of its evaluative factors apply with equal force to the first and second prongs.

The State's experts spent little time discussing this part of the test. As Dr. Weinstein remarked in his unrebutted testimony, "I don't think there is any question by anybody that [Brumfield] was not able to function adequately and he had development problems. Some people may question or may have some disagreement on whether it's mental retardation, learning disability, something else. But there is no question that he had very serious problems from very early on in life." (Doc. 102, p. 87). Dr. Swanson likewise made that same conclusion in her expert report on

Brumfield's social history. (Doc. 30–1, p. 30). Dr. James Merikangas conducted a neurological exam on Brumfield in 2007 which failed to disclose any acquired brain damage or ongoing disease that might negate the existence of an organic reason for Brumfield's mental retardation. (Merikangas Report, Doc. 30–1, p. 41).

The State correctly points out that, prior to his *Atkins* claim, Brumfield had never been diagnosed as mentally retarded. In particular, Dr. Hoppe reviewed Brumfield's medical and school records and concluded that no less than six doctors performed psychological testing on Brumfield and none of them diagnosed him with mental retardation. (Hoppe Psychological Evaluation, Ex. S–42, pp. 7–9; Hoppe Testimony, Doc. 104, pp. 53, 63–64; Greenspan Testimony, Doc. 101, p. 208 (listing experts who previously evaluated Brumfield)). Dr. Blanche made a similar conclusion in that the school had a financial incentive to make all diagnoses they could in order to receive extra education funding. (Blanche Report, Ex. S–44, p. 6; Blanche Testimony, Doc. 105, pp. 12, 28, 36).

Courts justifiably view with suspicion made-for-litigation diagnoses. *See Dunn III*, 41 So. 3d at 472. On the other hand, though, sometimes litigation serves as the impetus for narrowly focusing on a person's abilities based on specific diagnostic criteria rather than relying on wide-ranging evaluations which may overlook certain facts peculiar to a mental retardation inquiry. The AAIDD's clinical guidelines do not preclude a retrospective diagnosis of mental retardation, even if the subject received childhood

psychological testing. (*See* User's Guide to 10th Edition, Ex. P–13, p. 17).

As already noted above in Part II.B, Dr. Swanson has given the Court a compelling reason to not draw a negative inference due to the lack of childhood diagnosis. She points out that during Brumfield's school years in the late 1970s, African–Americans males were bring disproportionately diagnosed with mental retardation. (Doc. 106, p. 55). School officials, psychologists, and appraisal teams were accordingly cautious not to over-represent black males as being mentally retarded and were instead urged to consider other alternatives that would avoid placing the mental retardation label on them. (*Id.*). Swanson confirmed that East Baton Rouge Parish schools, which Brumfield attended, had received this admonition. (*Id.*). AAIDD standards confirm that lack of an earlier mental retardation diagnosis may indeed be attributable to that pressure. The User's Guide recognizes that "the school's concern about overrepresentation for data reporting purposes of specific diagnostic groups within their student population" might require a retrospective analysis. (Ex. P–13, p. 18). It also acknowledges that a person might be "given no diagnosis or a different diagnosis for 'political purposes' such as protection from stigma or teasing, avoidance of assertions of discrimination, or related to conclusions about the potential benefits or dangers of a particular diagnosis." (*Id.*). Because the school appraisal teams might have looked past factors pointing toward Brumfield's mental retardation in favor of diagnosing him with more politically palatable ailments, like conduct disorders

and behavioral problems, the Court refuses to treat his lack of prior diagnosis as preclusive.

Etiological factors appear to bolster the conclusion that Brumfield was and is mentally retarded. Etiology divides up into four general categories: biomedical, social, behavioral, and educational. (10th Edition, Ex. P–11, p. 123). The State failed to present etiological testimony as such, though its experts certainly did evaluate Brumfield's social, behavioral and educational issues as represented in his medical and school records. Biomedical factors relate to genetics and parental health during pregnancy (prenatal), premature birth and birth injury (perinatal), and nutrition, existence of traumatic brain injury, and degenerative disorders (postnatal). (*Id.*, Table 8. 1, p. 127).

Dr. Weinstein testified regarding Brumfield's etiological risk factors. (*See* Weinstein Report, Doc. 30–1, p. 17). With regard to biomedical factors during the prenatal period, he found that Brumfield's mother had psychiatric problems and took psychotropic medication during her pregnancy. (Doc. 102, pp. 88–89). In the perinatal period, Brumfield was born prematurely at 36 weeks and his birth weight appears to have been low at between three and three and a half pounds. (*Id.*, p. 89). Brumfield also suffered fetal stress during birth. (*Id.*). Postnatally, Brumfield was shot and hit by a car prior to age 18 (*id.*, pp. 90–91), although neuroimaging of his brain did not reveal any lasting effect. (*See* Merikangas Report, Doc. 30–1, p. 41). Genetically, it appears several of Brumfield's family members also suffer from mental retardation, including a wheelchair-bound first cousin with moderate to severe retardation. (Weinstein

Report, Doc. 30–1, p. 17; Weinstein Testimony, Doc. 102, pp. 33–35).

With regard to the social factors, Brumfield was institutionalized, neglected, and suffered severe physical abuse from domestic violence. (Weinstein Testimony, Doc. 102, p. 92). Brumfield's mother lacked prenatal care and did not even know she was pregnant until six months into her term. (*Id.* p. 88). Poverty played a large role throughout Brumfield's life. (*Id.*).

With regard to educational factors, Weinstein testified that school officials' efforts to intervene in Brumfield's educational decline were inadequate, resulting in delayed diagnosis of Brumfield's deficiencies. He also found inadequate family support, including his mother's lack of preparation for parenthood. (*Id.*, pp. 90–92).

Behaviorally, Brumfield suffered from apparent parental drug use during pregnancy along with violence, abuse and neglect during his upbringing. (*Id.* pp. 88–89).

All of the shortcomings listed above are risk factors that play an important role in making a mental retardation diagnosis. (10th Edition, Ex. P–11, pp. 123–128). The Court's conclusions with respect to the first two prongs have been shown by a preponderance of the evidence to have existed before Brumfield turned 18. While he was not diagnosed as mentally retarded prior to adulthood, that fact alone in no way detracts from this Court's conclusion. The etiological risk factors, along with Brumfield's school and medical records, indicate that his mental health problems and

developmental delays occurred prior to adulthood. The State has introduced no evidence suggesting that Brumfield's mental health problems were caused by brain trauma or through another causative factor manifesting itself after he became an adult. Nor could the State's experts even pretend to know many of his etiological risks because they failed to interview anyone other than Brumfield himself. While disagreement certainly exists over whether Brumfield's school records and prior medical history preclude a diagnosis of mental retardation, show another related diagnosis, or simply fail to meet the *Atkins* standard, those disagreements center on differing interpretations of evidence, not on an absence of evidence prior to adulthood. Based on the showing of substantial intellectual functioning and adaptive behavior deficiencies detailed above, the Court credits the testimony of Brumfield's experts and finds Brumfield has met his burden to show by a preponderance of the evidence that those deficits occurred before he turned 18.

IV.

Judges are tasked with solemn and difficult obligations. At times, they must grapple with the subjective elements of our legal system and search in vain for the easy answer, the convenient out. Only by applying an equal amount of diligence and common sense to the unsavory cases that courts normally apply to the familiar ones can it be said that "equal justice under law," that confident phrase boldly inscribed above the entrance to the Supreme Court, is uniformly available to all.

In evaluating *Atkins* claims of mental retardation, courts must disregard whatever preconceptions they might have about this intellectual disability. Mildly mentally retarded persons usually do not have obvious physical manifestations of their shortcomings, as may be the case with persons diagnosed with Down's Syndrome. Nor are their intellectual capabilities so severely impaired as to be immediately noticeable to most people in casual conversation, as is the case with profoundly mentally retarded individuals. Indeed, the line between the upper range of mildly mentally retarded persons and the borderline cases where mild mental retardation is not shown can be exceedingly blurry and subjective. Yet if we as a society are to effectuate the evolving standard of decency contemplated by the Eighth Amendment's prohibition on cruel and unusual punishment, we must accept as a given that certain cases will present unfortunate facts which, when viewed under the law, result in an outcome at odds with majoritarian sentiment. This may be one of those cases in the eyes of some.

It bears repeating that the remedy granted here is a limited one. While ineligible for execution, Brumfield will remain incarcerated in Angola for the rest of his life. This ruling does not "let him off easy" on some convoluted procedural technicality. It merely seeks to fairly apply the law as written. Louisiana's statute vests significant discretion in making the mental retardation evaluation with the jury. But no jury is available now. In a post-verdict posture, the Louisiana Supreme Court charges judges with making this decision. Judges must weigh the credibility of

witnesses and fair-mindedly view the evidence presented. Even a convicted murderer deserves no less. Had the State presented more persuasive expert testimony, the result here might have been different. But it is not the role of a judge to hypothesize what testimony or evidence might have been presented; we can only act with what we have before us. At bottom, this case is about dispassionately applying the clinical guidelines on mental retardation, which Louisiana law has adopted as its legal test, to the facts as presented. Tasked with this duty, the Court concludes, under the totality of the circumstances and based on a preponderance of the evidence, Kevan Brumfield has demonstrated he is mentally retarded as defined by Louisiana law.

V. CONCLUSION; ORDER

Kevan Brumfield's petition for a writ of habeas corpus is hereby GRANTED insofar as he is ineligible for execution because he is mentally retarded.

Accordingly, it is ORDERED that the State is permanently enjoined from executing Brumfield.

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KEVAN BRUMFIELD

VERSUS CIVIL ACTION

BURL CAIN, ET AL. NO. 04-787-JJB-CN

RULING

The court has carefully considered the petition, the record, the law applicable to this action, and the Report and Recommendation of United States Magistrate Judge Christine Noland dated April 15, 2008 (doc. no. 37). The defendant filed an objection which has been duly considered. Additionally, the court held oral argument on June 30, 2008.

The court hereby approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein. Accordingly, the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 (doc. no. 1) filed by petitioner, Kevan Brumfield, is GRANTED IN PART, in that petitioner is entitled to an evidentiary hearing relative to his *Atkins* claim, and DENIED IN PART, in that all of the petitioner's remaining claims will be dismissed with prejudice. Further, prior to an evidentiary hearing being

conducted relative to petitioner's *Atkins* claim, the State will be allowed the opportunity to conduct discovery and retain experts to rebut the *prima facie* case submitted by petitioner.

Baton Rouge, Louisiana, this 30th day of June, 2008.

/s/

JAMES J. BRADY

UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KEVAN BRUMFIELD CIVIL ACTION

VERSUS

BURL CAIN, ET AL NO. 04-787-D-M2

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 10 days from the date of service of this Notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. The failure of a party to file written objections to the proposed findings, conclusions, and recommendation contained in a Magistrate Judge's Report and Recommendation within 10 days after being served with a copy of the Report shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge that have been accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in chambers in Baton Rouge, Louisiana, April 15, 2008.

MAGISTRATE JUDGE
CHRISTINE NOLAND

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

KEVAN BRUMFIELD CIVIL ACTION

VERSUS

BURL CAIN, ET AL NO. 04-787-D-M2

MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

This matter is before the Court on the Original and First Amended Petitions for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (R. Docs. 1 and 30) filed by petitioner, Kevan Brumfield ("Brumfield"). Through those petitions, Brumfield challenges his conviction and death sentence on the charge of first degree murder imposed in the 19th Judicial District Court, Parish of East Baton Rouge. The State has filed oppositions to both of Brumfield's petitions. (R. Docs. 12 and 36).

FACTS & PROCEDURAL BACKGROUND

On February 3, 1993, Brumfield was indicted on the charge of first degree murder of Baton Rouge Police Department Corporal Betty Smothers, a violation of La. R.S. 14:30. He was formally arraigned and entered a plea of not guilty on February 12, 1993. Following a jury trial from June 12, 1995 through July 2, 1995,

Brumfield was found guilty as charged. The penalty phase of his trial was conducted on July 3, 1995, at which time Brumfield was sentenced to death. Brumfield appealed his conviction and sentence to the Louisiana Supreme Court, both of which were affirmed on October 20, 1998. Brumfield then applied to the United States Supreme Court for a writ of certiorari and/or review, which was likewise denied.

On March 16, 2000, petitioner filed an application for post-conviction relief with the state trial court. The State filed an answer to Brumfield's post-conviction relief application, wherein it argued that all of the issues raised by Brumfield had either been raised previously on direct appeal or were procedurally barred for his inexcusable failure to raise them on direct appeal. The State also argued that Brumfield's application should be dismissed because the remaining issues that he raised were "vague and nebulous" and did not "specify with reasonable particularity the factual basis for which relief could be granted." In response to the State's answer to his post-conviction relief application, Brumfield filed a First Amended Petition for Post-Conviction Relief. At a hearing on October 23, 2003, Brumfield indicated that his amended petition incorporated all claims asserted in his original petition and that his amended petition was designed to replace his original petition. *See*, Page 2, Transcript from October 23, 2003 hearing regarding post-conviction relief claims.[1]

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[1] In his First Amended Petition for Post-Conviction Relief, Brumfield set forth the following issues for review: (1) the Eighth

The trial court denied Brumfield's application for post-conviction relief in its entirety at the October 23, 2003 hearing. After receiving an extension to file a writ with the Louisiana Supreme Court related to his request for post-conviction relief, Brumfield timely filed a writ on January 8, 2004, asserting the same issues as he had presented to the trial court for review. The writ application was denied by the Louisiana Supreme Court on October 29, 2004.

Brumfield then timely filed his original petition for a writ of habeas corpus with this Court on November 4, 2004. In his initial petition, he asserts the following issues for the Court's review: (1) the state court erred

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Amendment prohibits execution of the mentally retarded as set forth in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), an evidentiary hearing should be held regarding that issue, and petitioner should have been declared mentally retarded; (2) cumulative error renders the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel (a) because of the penalty phase of the trial; (b) because of the overall cumulative impact on the trial, (c) because penalty phase counsel was not properly qualified, (d) because counsel failed to investigate and prepare mitigating evidence, (e) because counsel failed to present mitigating evidence, (f) because the penalty phase argument was unacceptable and irrelevant, (g) because counsel failed to rehabilitate a social worker's testimony, (h) because counsel did not ensure production of a complete record, (i) because counsel failed to object to penalty phase evidence offered by the state, (j) because counsel failed to raise the issue of petitioner's capacity to proceed, and (k) because counsel failed to properly voir dire prospective jurors; (4) petitioner's conviction and sentence should be overturned due to juror misconduct and impartiality; and (5) other listed claims of error.

in failing to grant relief on petitioner's *Atkins* claim and erred in refusing to hold an evidentiary hearing on his claim of mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) he received ineffective assistance of counsel because (a) his penalty phase counsel was not qualified to try a capital case, (b) his counsel failed to investigate and prepare to offer mitigation evidence, (c) his counsel failed to adequately present mitigating evidence, (d) his counsel presented an unacceptable and irrelevant argument in the penalty phase, (e) his counsel failed to rehabilitate a social worker witness on the issue of her attitude regarding the death penalty, (f) his counsel failed to insure that a complete record of the trial proceedings was produced, (g) his counsel failed to oppose and/or object to improper evidence offered by the State during the penalty phase, (h) his counsel failed to raise the issue of his mental capacity, and (i) his counsel failed to conduct a proper examination of prospective jurors; (4) misconduct by the jurors requires his conviction and sentence to be overturned; and (5) other general claims and issues, including (a) his conviction and sentence were obtained with a confession that was not voluntary and intelligent but was instead coerced, (b) the trial court's jury charge and the verdict form failed to include various lesser included offenses, (c) the prosecutor improperly presented and relied upon evidence of aggravating factors other than those listed in La. C. Cr. P. art. 905.4, (d) the trial court improperly restricted Brumfield's presentation of mitigating circumstances, (e) the record contains no indication that the jury was unanimous as to any single aggravating circumstance,

(f) the trial court improperly failed to instruct the jury that each juror could consider any mitigating circumstance without the concurrence of any other juror, (g) prejudicial hearsay concerning other crimes allegedly committed by Brumfield was improperly allowed, (h) the trial court improperly allowed the prosecution to cross-examine Dr. Cecile Guin with a hearsay statement from the report of another expert who never testified at trial, (i) the trial court's jury charge as to "reasonable doubt" was constitutionally inadequate, (j) the trial court erroneously allowed the prosecutor to attack Brumfield's character on the basis of pre-trial actions and defenses pursued by his counsel, (k) death by lethal injection is cruel and unusual punishment, (l) Brumfield cannot be executed as long as he is incompetent, and (m) Brumfield has been indigent since the time of his arrest.

As noted above, the State filed an opposition to Brumfield's original habeas petition on September 7, 2005. Although the State conceded that Brumfield had exhausted his state court remedies relative to the claims in his original petition and that such petition was timely, it nevertheless argued that his claims therein should be dismissed because adequate and independent state procedural bars foreclose relief to petitioner on many of his claims and because the state court rulings denying his claims are entitled to a presumption of correctness.

On January 17, 2006, Brumfield's original habeas petition was referred to the undersigned for a report and recommendation. However, prior to such report being issued, the Court appointed counsel for

Brumfield, and a status conference was held on April 24, 2006, at which time Brumfield's newly-appointed counsel indicated that he would need some time to conduct fact and expert discovery and to prepare a first amended habeas petition ("amended petition"). A proposed budget was initially submitted by petitioner's counsel relative to the funds that would be needed for fact and expert investigation and the preparation of the amended petition; however, due to the association of the Federal Public Defender Board in this case on December 5, 2006, it was no longer necessary for the Court to set a budget, as that office undertook the financial obligations of the case. Following fact and expert discovery, Brumfield's amended petition was filed on October 1, 2007, which presented additional argument and evidence relating to the following claims that had been asserted in Brumfield's original habeas petition: (1) that Brumfield suffers from mental retardation and therefore cannot be executed; (2) that execution by lethal injection violates Brumfield's right to be free from cruel and unusual punishment under the Eighth Amendment; and (3) that Brumfield's conviction and sentence were obtained with a confession that was not voluntary and intelligent but instead was coerced in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The State opposes Brumfield's amended petition and contends that it should not be considered by the Court because: (1) the claims raised therein have not been properly exhausted in the state courts because Brumfield seeks to greatly expand both the claims he presented to the state courts as well as the facts and

evidence in support of his claims; and (2) the claims asserted therein do not "relate back" to Brumfield's original petition filed nearly three years ago.

LAW & ANALYSIS

I. Do adequate and independent state procedural bars foreclose relief to Brumfield on Claim Nos. 2, 4, and 5 of his original habeas petition?

A federal court that reviews a state prisoner's habeas claim must respect a state court's determination that the claim is procedurally barred under state law. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 2508-09, 53 L.Ed.2d 594 (1977). However, a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 1043, 103 L.Ed.2d 308 (1989); *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief). However, if a petitioner can show "cause" and "prejudice" for his procedural default, the court may review the merits of his claims. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause and prejudice as a

result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice").

The last state court to address the merits of Brumfield's claims was the 19th Judicial District Court, when it considered Brumfield's amended petition for post-conviction relief during a hearing on October 23, 2003.[2] [3] In its opposition to Brumfield's original habeas petition, the State contends that Claim Nos. 2, 4, and 5 of that petition were dismissed by the trial court pursuant to independent and adequate state procedural grounds. The Court agrees.

The trial court dismissed Claim No. 2, the general claim that a cumulation of error rendered the conviction constitutionally unreliable, on the following grounds:

> [Brumfield] does not provide any evidence of error in that claim. There is no showing of how the accumulation of error in this case renders the conviction unconstitutionally reliable. It does not specify with reasonable particularity

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[2] During the hearing, the trial court confirmed with Brumfield's counsel that the amended petition for post-conviction relief incorporated all claims in the original petition, was intended to replace the original, and was to be the only petition considered during the October 23, 2003 hearing.

[3] As noted above, although Brumfield filed an application for a writ to the Louisiana Supreme Court to have it review the trial court's decision on his post-conviction relief application, the Supreme Court denied Brumfield's writ application on October 29, 2004.

> the factual basis and does not allege a claim which if established would entitle the petitioner to relief, so that claim is dismissed.

See, Post-Conviction Relief Hearing transcript, Page 4. Based upon the express language used by the trial judge, it is clear that Claim No. 2 of the original petition was dismissed pursuant to the following three articles: (1) La. C. Cr. P. art. 926(B)(3), which provides that, in a petition for post-conviction relief, a petitioner shall state the grounds upon which relief is sought, specifying "with reasonable particularity the factual basis" for such relief; (2) La. C. Cr. P. art. 926(E), which states that the "inexcusable failure of the petitioner to comply with the provisions of [art. 926] may be a basis for dismissal of his application;" and/or (3) La. C. Cr. P. art. 928, providing that a post-conviction relief application may be dismissed "if the application fails to allege a claim which, if established, would entitle the petitioner to relief."

The "independence" requirement is fulfilled relative to Claim No. 2 because the last state court rendering a judgment on the merits of Brumfield's claim "clearly and expressly" indicated that the judgment rested on a state procedural bar. *Glover*, at 902, citing *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995). Moreover, La. C. Cr. P. articles 926 and 928 enjoy a presumption of "adequacy" because the state court expressly relied upon them in deciding not to review a claim for collateral relief. *Glover*, at 902. There is no suggestion that such rules have been applied selectively or irregularly by the state courts, and Brumfield has not come forward with any argument or evidence to trump

the presumption of adequacy. *Id.* (An "adequate" rule is one that state courts strictly or regularly follow, and one that is applied evenhandedly to the vast majority of similar claims). Accordingly, Brumfield is procedurally barred from asserting Claim No. 2 in this Court, and that claim should be dismissed. *Sayre v. Anderson*, 238 F.3d 631 (5th Cir. 2001).

As to Claim No. 4 of his original petition, alleging jury misconduct and lack of impartiality, the trial court dismissed that claim on the following grounds:

> The defendant claims that anti-defense gestures were made by a juror and reports of familiar relationship being demonstrated following the jury's return of the death sentence. This is not grounds for post-conviction relief, even if it was set out with enough particularity, and, therefore — well actually — and it's also something that should have been raised on appeal . . .
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> * * * * *
>
> . . . [T]he bottom line is that does not fall within the grounds for post-conviction relief, in any event, and, therefore, that will be dismissed based on that. The second part of his claim is that the jury lacked impartiality due to pretrial publicity. The issue of venue change was unsuccessfully raised on appeal, and in addition to that, again, it is also not grounds for post-conviction relief as set out in 930.3. Therefore, that one will be dismissed.

See, Post-Conviction Relief Hearing transcript, Pages 10-11. Considering that Claim No. 4 was expressly

dismissed on procedural grounds pursuant to La. C. Cr. P. art. 930.3 (setting forth the specific grounds for which a petitioner shall be granted post-conviction relief) and La. C. Cr. P. art. 930.4 (providing that any claim for relief which was fully litigated on appeal shall not be considered on a post-conviction relief application), both of which have been recognized as "independent" and "adequate" grounds precluding federal review,[4] the Court should also dismiss Claim No. 4 as procedurally barred.

Finally, with regard to Claim No. 5 of the original petition, which includes thirteen general allegations of error, the trial court stated the following:

> The Court: Claim Number 5 is a group of claims, Paragraphs 91 through 100, which each set out claims that are I guess separate from each other, and I'll take those one at a time; although, I will say that my reading them, none of these are actually claims that fall within the enumerated grounds for post-conviction relief, and some have already been raised on appeal. Paragraph 91 refers to the coerced confession. That issue was raised on appeal. Therefore it will be dismissed. Paragraph 92, jury charge and verdict form failed to include various lesser included offenses, for example, attempted first degree murder, et

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[4] *See, Hull v. Stalder*, 234 F.3d 706 (5th Cir. 2000) (La. C. Cr. P. art. 930.3 was held to serve as an independent and adequate state law ground for denial of federal habeas review); *Desalvo v. Cain*, 2002 WL 1585564) (La. C. Cr. P. art. 930.4 held to have acted as an independent and adequate state ground to preclude a claim).

cetera. I'm not sure why that wasn't raised on appeal, which would be the time to challenge the juror — I'm sorry, the jury charge, but the law is clear that that is not a responsive verdict set out in the Code of Criminal Procedure. And, again, just so the record is clear, why wasn't that raised on appeal?

Mr. Westling [defense counsel]: I can't answer that, Judge. Not having handled the appeal makes that difficult to understand.

The Court: That one will also be dismissed. Paragraph 93, prosecutor improperly presented and relied on improper aggravating factors. Again, this is not grounds for post-conviction relief. It's something that should be handled on appeal.

Mr. Westling: I'm sorry?

The Court: Do you have any reason why it was not?

Mr. Westling: No, I don't.

The Court: All right. That is dismissed. Paragraph 94, the trial court improperly restricted the defendant's presentation of mitigating circumstances. That was raised on appeal unsuccessfully. Therefore, that is dismissed. Paragraph 95 alleges that there was no indication that the jury's verdict was unanimous. Again, this is not something that's set out in the grounds for post-conviction relief.

It's also something that should have been handled on appeal, and I assume —

Mr. Westling: The same answer.

The Court: — You don't know why.

Mr. Westling: Exactly, your Honor.

The Court: In any event, that is dismissed. It's not grounds and should have been handled on appeal. The trial court failed to properly instruct the jury. The same response. It's not ground under 930.3 and should have been handled on appeal. And I assume, again, you didn't handle it. You can't answer why it was not.

Mr. Westling: That's correct, your Honor.

The Court: That one is dismissed. Paragraph 97, prejudicial hearsay concerning other crimes was improperly allowed. That was argued on appeal and litigated on appeal, and therefore, that will be dismissed. Paragraph 98, hearsay issue relating to the State's cross-examination of social worker. That was appealed and litigated on appeal, and, therefore, that will be dismissed. Paragraph 99, reasonable doubt instructions were constitutionally inadequate. This was raised on appeal. Therefore, it will be dismissed. Paragraph 100, the trial court allowed the state to attack the defendant's character on an improper basis. And, again, that was appealed, and like all of these, Paragraph 91 through 100, it's not proper grounds for post-conviction relief.

> In the defendant's reply to the State's response to the Amended Petition for Post-Conviction Relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under 930.3, and it's not set out with enough particularity. Therefore, it will be dismissed. And since the amended petition replaced the original petition I think that's all of the claims that are being addressed at this time.

See, Post-Conviction Relief Hearing transcript, Pages 11-14. Considering that the trial court clearly and expressly dismissed the various allegations contained in Brumfield's Claim No. 5 based upon La. C. Cr. P. arts. 930.3 and 930.4, Brumfield is procedurally barred from raising those claims upon habeas review. Furthermore, Brumfield has not demonstrated cause or prejudice relative to his procedural default on Claim Nos. 2, 4, and 5, and the Court therefore cannot review the merits of those claims.

II. Should Brumfield's remaining claims be dismissed because the state trial court's rulings on those claims are entitled to a "presumption of correctness"?

An application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication of the claim: (1) resulted in a decision that

is contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1) and (d)(2). In addition, determinations of factual issues made by state courts shall be presumed correct, unless particular statutory exceptions to 28 U.S.C. § 2254(d) are implicated, and the applicant shall have the burden of rebutting that "presumption of correctness" by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Williams v. Collins*, 16 F.3d 626 (5th Cir. 1994).

A. Claim No. 1 of Brumfield's original and amended habeas petitions: The state court's failure to hold an *Adkins* hearing on the issue of mental retardation and related failure to find Brumfield mentally retarded:

1. Applicable Law:

In *Adkins v. Virginia, supra*, the United States Supreme Court held that execution of mentally retarded persons constitutes an excessive punishment in violation of the Eighth Amendment. *Id.* at 321.[5] The

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[5] In defining "mental retardation," the U.S. Supreme Court in *Adkins* referred to the definition used by the American Association on Mental Retardation ("AAMR"), which defines the term as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently

Supreme Court left to the states the "task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." *Id.* Subsequently, in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So. 2d 835, the Louisiana Supreme Court adopted the holding in *Atkins*, and assuming the task of developing appropriate ways to

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> with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18. Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

The Supreme Court also referred to the similar definition of "mental retardation" used by the American Psychiatric Association:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system. Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, at 309.

determine which offenders will be spared the death penalty because of mental retardation, the Louisiana Supreme Court directed trial courts, in post-*Atkins* hearings:

> (1) to order a pre-trial evidentiary hearing on the issue of mental retardation when the court has 'reasonable grounds' to believe a defendant is mentally retarded, [La. C. Cr. P.] art. 643;
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> (2) to hold the hearing before a judge, not a jury; and
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> (3) to require the defendant to prove by a preponderance of the evidence that he meets the criteria established in Louisiana's statutory definition of mental retardation, La. R.S. 28:381 [defining retardation as "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior, and manifested during the developmental period].

See, Williams, at 854; *State v. Lee*, 2005-2098 (La. 1/16/08), 2008 WL 343031. As to intelligence testing, the Louisiana Supreme Court noted that the Wechsler and the Stanford-Binet IQ scales are most frequently used, and sub-average intelligence on those tests is 70 or below using the Wechsler scale, and 68 or below using the Stanford-Binet Scale. *Id.* at 853. With regard to adaptive skills, the court noted that the individual must have substantial functional limitations in several areas of major life activity: (1) self-care, (2) understanding and use of language, (3) learning, (4) mobility, (5) self-direction, and (6) capacity for

independent living. *Id.* at 854. The court pointed out that it is the individual defendant's burden to provide objective factors that put at issue the fact of mental retardation, and a defendant's entitlement to an *Atkins* hearing is to be made on a case-by-case basis. *Id.* at 857.

In response to *Atkins* and *Williams*, the Louisiana Legislature enacted 2003 LA. ACTS 698, which created La. C. Cr. P. art. 905.5.1. Article 905.5.1 provides for a procedure used in the event a defendant raises a claim of mental retardation. Under that article, such a defendant has the burden of proving mental retardation by a preponderance of the evidence, and mental retardation is defined as:

> a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

La. C. Cr. P. art. 905.5.1(H)(1); *State v. Lee*, at *27. The article concludes with an advisory list of several medical conditions which "do[] not necessarily constitute mental retardation." *Id.* Included in that list are behavioral disorders; difficulty in adjusting to school; emotional disturbance; emotional stress in home or school; emotional, cultural, or economic disadvantage; epilepsy or other seizure disorders; lack of educational opportunities; mental illness; neurological disorders; organic brain damage occurring after age 18; learning disabilities; speech and language disorders; and personality disorders.

2. Brumfield's state post-conviction *Atkins* claim:

During Brumfield's October 2003 hearing on his post-conviction relief application, the trial judge addressed his mental retardation claim and the trial court's failure to hold an evidentiary hearing relative to such claim. *See*, Post-Conviction Relief Hearing transcript, Page 3. He noted that not everyone facing the death penalty is entitled to such an evidentiary hearing and further stated:

> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guin's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue — there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found [Brumfield] had an IQ of over — or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he

> is not entitled to that hearing based on all of those things that I just set out.

See, Post-Conviction Relief Hearing transcript, Pages 3-4. In reaching his conclusion on Brumfield's post-conviction *Atkins* claim, the trial judge relied upon evidence that had been produced during Brumfield's state sentencing proceedings.[6] It should be noted, however, that, because Brumfield's sentencing proceedings occurred in 1995, prior to *Atkins* being decided in 2002, the focus of his experts' evaluations and testimony during those proceedings did not concern the elements of proving mental retardation as defined by the Louisiana Supreme Court and Louisiana legislature following *Atkins*. Instead, the testimony and evidence presented at Brumfield's sentencing hearing related to Brumfield's medical history, mental illness/attention deficit disorder, and abuse/neglect.

Specifically, during Brumfield's sentencing hearing, he presented the testimony of Dr. John Bolter ("Dr. Bolter"), a clinical neuropsychologist. Dr. Bolter testified regarding a comprehensive battery of tests that he performed on Brumfield to determine whether he had any neurological deficits in cognitive functioning. Sentencing Hearing, Vol. XVI, p. 145. His findings included the following: (1) Early in life, Brumfield manifested conduct disorder with extreme

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[6] With his original and amended post-conviction relief applications, Brumfield did not submit any new evidence in support of his mental retardation claim and instead submitted five paragraphs, which cited to evidence that had been presented during his sentencing proceedings.

levels of aggressivity and a disregard for basic rights of others, educational problems, and attention deficient disorder; and (2) As an adult, Brumfield has had more of an antisocial or sociopathic personality, continued attention difficulty (*i.e.*, he cannot concentrate for an extended period), borderline general level of intelligence, specifically an IQ of 75 using the Webster Adult IQ test (very poor academic skills, including a fourth grade reading level and sixth grade math and spelling level), and a rapid rate of forgetting due to his attention deficit disorder. Vol. XVI, pgs. 146-147. Dr. Bolter testified that he was aware that Dr. Bryan Jordan ("Dr. Jordan") also tested Brumfield's IQ and rated it a "little higher" than he had and that his testing did not factor in Brumfield's ability to function in the real world.[7] Vol. XVI, p. 149, 151. Dr. Bolter further indicated that, while Brumfield's low birth weight placed him at risk for some form of potential neurological trauma, it was not necessarily predictive of significant mental difficulties, and some children with Brumfield's birth weight are "just fine." Vol. XVI, pg. 148. Lastly, Dr. Bolter explained that physicians attempted to treat Brumfield with medications for his condition, but he refused to take the medications.

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[7] Dr. Jordan's report also indicated that Brumfield's intellectual functioning was "slightly limited but generally close to the Average Range." (Dr. Jordan's report, p. 3). Dr. Jordan also concluded that Brumfield had a sociopathic personality disorder, antisocial in type, and poor impulse control, especially in the area of aggression. Vol. XVI, p. 139-140.

The defense also presented the testimony of Dr. Cecile Guin ("Dr. Guin"), a social worker who evaluated Brumfield, during the sentencing phase. Sentencing Hearing, Vol. XVI, p. 99. Dr. Guin conducted a social history on Brumfield by interviewing him ten to twelve times and by interviewing his third, fourth, and fifth grade teachers, various family members of the defendant, and Dr. Bolter. Vol. XVI, p. 112-113. She also reviewed various records from physicians, medical facilities, and homes visited by Brumfield. She testified that Brumfield's childhood family life was "very chaotic, [and] very complicated," and that Brumfield's family was not able to teach him how to fit into society (*i.e.*, no role model). Vol. XVI, p. 114. Combined with this non-supportive home environment, Dr. Guin concluded that the following factors had shaped Brumfield as a person: (1) his low birth weight, (2) a neurologically-based hyperactivity or learning disability which was not diagnosed early enough, (3) six out-of-home placements, (4) his failure to get help immediately in the school system, (6) six father figures, and (7) going to fourteen to fifteen different schools in 14 years (and being discharged from the East Baton Rouge Parish School System at the end of the ninth grade). Vol XVI, pgs. 128-129.

On cross examination, however, the State brought out several inconsistencies in information provided to Dr. Guin by Brumfield and others. For example, Brumfield's mother reported that her son weighed 2.5 pounds at birth and that he was born prematurely, neither of which were consistent with official medical records. Vol. XVI, p. 114. In addition, Brumfield told

Dr. Guin that he had only witnessed a murder related to a drug deal in 1989, while he informed Dr. Jordan that, during that incident, he shot a drug user who refused to pay and fled in his car. Vol. XVI, p. 135.[8]

Brumfield also told Dr. Guin that he had been employed as a cook at two restaurants during his adult life, and the maximum period of Brumfield's adult work history involved working approximately three months at Ralph and Kacoo's Restaurant. Vol. XVI, p. 138. Dr. Guin also testified that Brumfield told her he quit his job at Ralph and Kacoo's to sell drugs because it was a "more effective" way of making a living. Vol. XVI, p. 138. When presented with information from Dr. Jordan's report indicating that Brumfield was "quite active socially" and that he had five illegitimate children with three different females that he did not support, Dr. Guin noted that, based upon information she obtained from the mother of Brumfield's first two children, Brumfield supported his first child. Vol. XVI, p. 139.

It was also pointed out on cross examination that Dr. Guin's testimony on direct examination regarding Brumfield's record of disciplinary incidents while in parish prison was based upon inaccurate records. She

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[8] Brumfield also reported to Dr. Guin that he was facing charges for an armed robbery that occurred during a drug deal; however, Dr. Guin admitted on cross examination that she was unaware that the defendant had actually been convicted of armed robbery and that he had put a gun to the victim's head and pulled the trigger. Dr. Guin also stated that she had not interviewed the two victims of the armed robbery. Vol. XVI, pgs. 136-137.

testified that Brumfield was involved in a total of thirteen incidents during the two and a half years he had been in prison and that those incidents had decreased over time. Vol. XVI, pgs. 131-132. However, she admitted, on cross examination, that she was unaware that Brumfield had been convicted of battery of a police officer while in prison and that such conviction might have affected some of her conclusions depending on the timing of the conviction. Vol. XVI, p. 137, 142.

The defense also presented the testimony of several of Brumfield's family members, who basically testified regarding abuse and neglect of Brumfield during his childhood.[9] However, the attorney for the Louisiana Office of Human Services indicated to the trial court during the sentencing phase that that office had no

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[9] Vella Brumfield, the defendant's mother, testified that Brumfield "missed [a] father figure" during his childhood and that he had a terrible relationship with his stepfather. She indicated that her son was a "Straight A" student during first and second grade but started having problems after his parents became separated. She further testified that her son declined in terms of education and "crime-wise" when he was placed in homes after the fifth grade. Vol. XVI, p. 63-75. Brumfield's father, Thurmond Ellis, indicated that he saw his son on a weekly or monthly basis after he and the defendant's mother split and that he recalled reports that Brumfield and his brother were abused by their stepfather. Vol. XVI, p. 84-86. Brumfield's brother, Teodis Brumfield, testified to verbal and physical abuse that he and his brother allegedly sustained and to a single alleged seizure that his brother had as a child. Teodis Brumfield admitted that he had been convicted as an accessory after the fact to an armed robbery in Clinton, Louisiana, at which the defendant was present. Vol. XVI, p. 93-98.

records on Brumfield concerning child abuse or neglect. Vol. XVI, p. 79. Finally, the defense called Brumfield's fourth grade teacher, Karen Cross, to testify as to the defendant's behavior and problems while at school. She testified that Brumfield could be very loving and affectionate at times and then "completely disruptive" at other times. She felt that his problems were due to issues with his attention span, making him better in a one on one situation or in small groups; however, she admitted, on cross examination, that she had not seen or had any awareness of the defendant's life activities in the ten to twelve years prior to her testimony. Vol. XVI, p. 88-92.

Based solely upon the evidence presented at Brumfield's sentencing hearing (and referenced in his amended post-conviction relief application), the Court agrees with the trial judge's conclusion that Brumfield failed to meet his burden of presenting objective factors that put at issue the fact of mental retardation and that he therefore was not entitled to an *Atkins* hearing. As noted above, the first objective factor that the defendant must sufficiently put at issue is sub-average intelligence, as measured by standardized IQ tests. As noted above, according to the IQ levels accepted by the U.S. and Louisiana Supreme Courts, sub-average intelligence is 70 or below using the Wechsler scale, and 68 or below using the Stanford-Binet Scale. The IQ score testified to by Dr. Bolter was 75, which is not low enough to be placed in either of those categories of sub-average intelligence.

Furthermore, as to the second objective factor, significant impairment in several areas of adaptive

skills, the testimony presented did not indicate that Brumfield was unable to live and function on his own in society or that he lacked the ability to care for himself, understand and use language, be mobile, or direct his life activities. Dr. Bolter, Dr. Guin, and Brumfield's teacher, Karen Cross, in fact, indicated that a significant part of Brumfield's difficulties actually stem from his attention deficit disorder, for which he does not take medications, and which, while it results in an inability to focus, is not equivalent to mental retardation.[10]

Finally, as to the third objective factor (manifestations of a neuropsychological disorder prior to the age of eighteen), none of the defense experts at the sentencing hearing testified that Brumfield was mentally handicapped but rather agreed with Dr.

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[10] Dr. Guin also strongly linked Brumfield's difficulties educationally and in life generally with his disruptive homelife during his childhood, unsubstantiated reports of abuse and neglect, and out of home placements, all of which indicate issues related to socialization rather than mental retardation. While there was some general testimony that Brumfield's low birth weight could have had possible cognitive impacts, Dr. Bolter admitted that low birth weight is not necessarily predictive of significant mental defects. Furthermore, neither Dr. Bolter nor Dr. Guin provided any testimony regarding the alleged seizure sustained by Brumfield as a child. Dr. Guin also testified that Brumfield made a conscious decision to quit gainful employment at a restaurant and make his living through drug dealing because he found it to be a "more effective" way to make a living. That decision, along with testimony that Brumfield was "quite active socially" and supported at least one of his children, indicates that Brumfield had the ability to independently direct his life activities.

Jordan's assessment that he had an antisocial or sociopathic personality disorder with associated attention and learning difficulties.[11] Brumfield's related attention and learning difficulties were noted to cause him to have a decreased ability to focus and process information; however, Brumfield's experts did not indicate that such difficulties resulted in an inability to function in society and perform the daily tasks of living. Thus, when only the evidence presented for the trial court's review at the October 2003 post-conviction relief hearing is considered, the Court finds that the trial judge's conclusion with respect to the need for an *Adkins* hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law.

3. Newly-presented evidence in Brumfield's amended habeas petition concerning his *Atkins* claim:

The next issue for the Court's determination is whether or not it should consider certain additional evidence that Brumfield has now presented with his amended habeas petition relative to his *Atkins* claim that he did not present to the state court during his post-conviction relief proceedings or to this Court with his original habeas petition. The reason the Court must make this determination is to ensure that Brumfield properly exhausted his *Atkins* claim in state court

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[11] As noted above, learning disabilities and behavioral and personality disorders are included among the list of conditions in La. C. Cr. P. art. 905.5.1, which do not necessarily constitute mental retardation.

before raising it in this Court. The exhaustion requirement is satisfied if a petitioner has "fairly presented the substance of his claim to the state courts" and is not satisfied if he "presents new legal theories or factual claims in his federal habeas petition." *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007), citing *Vasquez v. Hillery*, 474 U.S. 254, 258, 106 S. Ct. 617, 88 L.Ed.2d 598 (1986). The Fifth Circuit Court of Appeals has addressed the precise issue before the undersigned in several cases and has held that, if the new evidence which is presented for the first time in the federal habeas court "*merely supplements*" the evidence presented in state court and does not "*fundamentally alter*" the petitioner's claims, the claim is to be considered exhausted, and the new evidence can be considered. *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005) [Emphasis added].

To understand what the Fifth Circuit means by the above standard, the Court will examine two cases in which that standard was applied relative to an *Atkins* claim and then, in light of those cases, apply the standard to the present case. In 2005, the Fifth Circuit applied the above-referenced standard in *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005). In that case, the petitioner, Morris, did not include an IQ score in a successive state habeas petition (which he filed as a result of *Atkins* being decided) because he lacked the funds to obtain the expert assistance required to administer such a test. After his state petition was dismissed, the Fifth Circuit allowed Morris to file a successive federal habeas petition on the *Atkins* issue, and the district court granted him leave to retain an

expert and investigative assistance. Morris underwent IQ testing, which revealed that he had a full-scale IQ of 53, and he presented that evidence to the federal court.

The State, in *Morris*, contended that the petitioner's *Atkins* claim was unexhausted because he had failed to present his IQ evidence to the state court. The Fifth Circuit disagreed, finding that, although Morris's federal claim was "unquestionably in a comparatively stronger evidentiary posture than it was in state court," several factors weighed in Morris's favor, specifically the following:

> [Morris] . . . properly outlined the AAMR's definition for mental retardation [in his state habeas petition], . . . and noted the necessity to meet all three essential prongs of the definition. Morris also clearly acknowledged that IQ evidence was lacking in his particular case but still insisted "[t]here is good reason to believe that [Morris is retarded] . . . because of the documented history of adaptive deficits," including Morris's "inability to read and write and his failure in functional academics," "inability to obey the law and follow rules," "inability to avoid victimization," "inability to develop instrumentalities of daily living [and] occupational skills," and "inability to maintain a safe environment," all of which were attested to by the sworn affidavits and school records presented to the state courts."

Id. [Citations omitted].

The Fifth Circuit noted that Morris had "consistently asserted that[,] given the opportunity and resources, intellectual tests would confirm" his mental retardation. *Id.* The Fifth Circuit therefore held that the state court had been given a fair opportunity to rule on the substance of the petitioner's *Atkins* claim and that his presentation of the IQ score for the first time on federal review only "supplemented, but did not fundamentally alter," that claim. *Id.*[12]

By contrast, in the more recent case of *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007), the Fifth Circuit found that a successive state court habeas petition filed by the petitioner, Moore, on an *Atkins* claim "paled in comparison" to the one considered in *Morris*. Moore merely asserted in his state court petition that he had scored a 74 on an IQ test when he was a child, that he had been placed in special education classes throughout his schooling, and that he had suffered multiple head injuries, one of which occurred when he was no older than ten. *Id.*, at 221. Unlike Morris, who submitted sworn affidavits and school

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[12] The Fifth Circuit considered *Morris* to be an "admittedly close case" on the issue of exhaustion but found that three factors weighed in favor of a finding of exhaustion: (1) A thorough review of Morris's state habeas petition revealed that his *Atkins* claim was "remarkably detailed in both fact and law;"(2) Morris consistently asserted that he was mentally retarded and that, given the opportunity and resources, intellectual tests would confirm that assertion; and (3) There was nothing in the record to suggest that Morris "attempted to expedite federal review by deliberately withholding essential facts from the state courts." *Id.*, at 496.

records to support his claim, Moore simply cited to the trial record in support of his claims. He also failed to reference the AAMR's diagnostic criteria for mental retardation or the similar definition adopted in the Texas Health and Safety Code. The Fifth Circuit found most significant Moore's failure to allege that he was deficient in two or more adaptive skill areas. The court of appeal noted that, even if the fact that Moore was in special education classes throughout his schooling could arguably be construed as an allegation that he was only minimally functional in an academic setting, he did not provide any evidence in support of that assertion, such as an identification of any specific special education classes he attended or documentation regarding those classes. Because Moore's petition "did not touch, even arguably, on any other adaptive skill area, let alone explain why supporting evidence was lacking," the Fifth Circuit held that the state habeas petition could not be considered sufficiently "detailed in fact and law" to warrant a finding of exhaustion." *Id.*, at 222.

In conclusion, the Fifth Circuit in *Moore* held that a petitioner has not adequately presented the substance of his *Atkins* claim to the state court for purposes of exhaustion unless he has, at the very least: (1) outlined the AAMR criteria or the substantial equivalent adopted by the applicable state; and (2) either alleged why he satisfies each criterion or asserted reasons why he is currently incapable of presenting any evidence on a particular prong. *Id.*, at 223. The court found Moore's state court petition "more akin to the type of conclusional allegation that [it] found insufficient to support exhaustion on an ineffective assistance of

counsel claim in *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003), than . . . to the robust claim of mental retardation presented to the state by the petitioner in *Morris*." *Id.*[13] Finally, the court concluded that Moore's procedural default, in failing to cite the *Atkins*

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[13] *See, Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003) (In state court, the petitioner only presented a conclusory affidavit from trial counsel "contending that there was abundant mitigating evidence . . . including, a troubled home life and family history of mental illness" to support his ineffective assistance of counsel claim. However, in federal court, he presented actual evidentiary support, including an affidavit from his mother and a detailed psychological report. The Fifth Circuit held that the petitioner's claim was unexhausted).

See also, Dowhitt v. Johnson, 230 F.3d 733 (5th Cir. 2000) (holding that the petitioner had exhausted his ineffective assistance of counsel mental illness claim where he presented detailed assertions of his paranoid schizophrenia to the state courts, even though he later offered additional affidavits by mental health experts opining on that same diagnosis to the federal court that were not previously presented to the state courts); *Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003) (In state court habeas proceedings, the petitioner argued that his counsel was ineffective for failing to investigate and present the testimony of an eyewitness whose testimony would have excluded the petitioner as the perpetrator. The petitioner did not include any evidence to support that allegation in state court; however, in federal court, he attached the eyewitness's affidavit stating that the petitioner was not present at the scene of the crime. The court held the exhaustion principle was satisfied, noting in an "admittedly close case" that several factors weigh in favor of exhaustion: (1) the ineffectiveness portion of the state habeas brief was "remarkably detailed in both fact and law;" (2) the petitioner was diligent and consistent in arguing his claim; and (3) the petitioner did not attempt to expedite federal review by withholding essential facts from the state courts).

prongs and submit evidence supporting each prong in his case, could not be excused because Moore had failed to demonstrate cause for his failures and actual prejudice. *Id.*, citing *Hillery*, 474 U.S. at 260, 106 S. Ct. 617.

As mentioned above, in his amended post-conviction relief application, Brumfield did not submit any new evidence in support of his mental retardation claim and instead submitted five paragraphs, which set forth the following information and cite to testimony that had been presented during his sentencing proceedings:

- Brumfield was 20 years of age at the time of the murder and still within the developmental stage set by the Louisiana statutes.
- Brumfield's IQ score as determined shortly before trial was 75, on the low end of the intelligence scale, and he was reading at approximately a fourth grade level.
- Brumfield was born prematurely; his birth weight was 3.5 pounds or less; medical records indicated that "he was born with slower responses than normal babies;" and he remained hospitalized for two to three months after birth.
- From childhood, Brumfield suffered severe, uncontrolled seizures; he was treated with numerous medications, including: Thorazine, Mellaril, Ritalin, Artane, and Vistaril; and he was treated as a child and adolescent at two psychiatric hospitals.

- As early as third grade, Brumfield's learning and behavioral disabilities were noted by teachers, and once diagnosed, he spent a significant amount of his schooling in special education classes.

See, First Amended Petition for Post-Conviction Relief. Brumfield concluded, in his amended petition for post-conviction relief, that, based upon his "IQ score of approximately 75, [his] deficits in adaptive behaviors, and his condition exist[ing] before the age of eighteen," his personal culpability in the murder was diminished, and his execution would not serve the two penological goals of the death penalty. He therefore claimed that he could not be executed and that he was entitled to an evidentiary hearing on his mental retardation claim in accordance with *Atkins* and *Williams*. It should also be noted that, in his original post-conviction relief application, and on at least two other occasions, Brumfield's counsel requested funds so that he could conduct an investigation and retain experts relative to Brumfield's claims; however, the state trial court never ruled upon those requests prior to denying Brumfield's post-conviction relief application.

Now, with his amended habeas petition, Brumfield seeks to introduce evidence fulfilling the three prongs of the AAMR definition of mental retardation that he was not able to produce in state court. For example, relative to his IQ, Brumfield has undergone, during the course of these proceedings, another Stanford-Binet IQ test, administered by a neuropsychologist, Dr. Ricardo Weinstein ("Dr. Weinstein"), which indicates that he has a Full Scale IQ of 69.9, within the range identified

for sub-average intelligence. Based upon that IQ score as well as various interviews with witnesses and a review of background materials, which reveal that Brumfield has exhibited concurrent adaptive behavior deficits in practical, social, and conceptual skills since before he was age 18, Dr. Weinstein concludes that Brumfield is mentally retarded.[14]

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[14] As part of his evaluation, Dr. Weinstein interviewed eleven people who have known Brumfield throughout his life, such as family members, a coach, a teacher, and the mother of one of his children. Dr. Weinstein also administered the Adaptive Behavior Assessment System II, (ABAS II), an instrument used to assess an individual's adaptive skills, to Brumfield and to his sister. The ABAS II results show a qualitative range of "extremely low" in all categories. Through the interviews Weinstein conducted, he assessed Brumfield's conceptual, practical and social skills, and he specifically concluded that the following are examples of activities and behaviors that Brumfield's siblings achieved that Brumfield did not achieve, in spite of being exposed to very similar environments and circumstances:

- Compared to siblings and cohorts, Brumfield was always delayed.
- He was unable to understand simple instruction even during his teen and adult years.
- As a child and juvenile, he was often unable to understand and follow rules of games and participate with his peers.
- He was unable to achieve academically even though he received special services and support.
- He had problems with his emotions and impulses.
- He exhibited poor judgment, and even as an adult, he was not aware of the consequences of his actions.
- He was unable to perform simple tasks requiring visual-spatial coordination including lacing his shoes.
- He never learned to perform any tasks or activities that would lead to gainful employment.

Brumfield also presents with his amended habeas petition the opinions of Dr. Victoria Swanson ("Dr. Swanson"), who reviewed his school records, mental health records, and various other materials during the course of these proceedings and who also opines that Brumfield suffers from mental retardation. Dr. Swanson indicates that Brumfield's prior IQ scores, based upon pre-trial testing by Dr. Bolter and Dr. Jordan, were not correct because they were not adjusted to account for the "Flynn Effect."[15] She also opines that Brumfield's rapid progression through different schools and residential facilities prevented his teachers and pupil appraisal teams from adequately assessing his progress and making referrals for additional evaluation when he did not progress.

- He could not follow instructions to the extent that prevented him from obtaining and keeping a job.
- He never lived independently, rented an apartment, entered into a contract, obtained a driver's license, saved money or opened a checking account.
- He has always been dependent on other individuals in order to f[illegible]tion in society.

See, Brumfield's amended habeas petition, R. Doc. 30, pp. 30-31.

[15] The "Flynn Effect," which has not been accepted in the Fifth Circuit as scientifically valid, *In re Salazar*, 443 F.3d 430, 433, n.1 (5th Cir. 2006), posits that, over time, the IQ scores of a population rise without corresponding increases in intelligence and thus the test must be renormalized over time. *In re Mathis*, 483 F.3d 395 (5th Cir. 2007). Under the "Flynn Effect" theory, the passage of time inflates test scores by approximately one-third to two-thirds of a point per year since the test was normed. The test scores are therefore reduced accordingly to account for that inflation over time.

Additionally, Dr. Swanson confirms that the IQ testing and adaptive skills assessment conducted by Dr. Weinstein are consistent with her analysis of Brumfield's historical records.[16]

Finally, Brumfield now presents the opinions of Dr. James Merikangas ("Dr. Merikangas"), a neurologist and psychiatrist, who recently conducted a neurological physical examination of Brumfield and reviewed his historical records and recent reports. Dr. Merikangas' neurological examination of Brumfield did not disclose any acquired brain damage, ongoing disease, or mental illness, and he also renders a medical opinion that Brumfield suffers from mental retardation that existed before he was 18 years old.

In addition to the opinions of the above medical professionals regarding the three diagnostic criteria under the AAMR definition of mental retardation, Brumfield also introduces new evidence related to certain "risk factors" for mental retardation that he

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[16] Specifically, Dr. Swanson states:

> School and mental health records are consistent with these assessments and indicate these deficits were present prior to the age of 18 in at least four of the DM-IV-TR specified adaptive areas (communication, social/interpersonal skills, self-direction, functional academic skills) and the three AAMR 10th Edition adaptive areas of conceptual skills (receptive and expressive language, reading, writing, self-direction), social skills (interpersonal, responsibility, self-esteem, following rules), and practical skills (occupational skills, instrumental activities of daily living).

See, Brumfield's amended habeas petition, R. Doc. 30, p. 31.

has, which Dr. Weinstein identified, specifically: (1) a family history of mental retardation, in that Brumfield's mother had two siblings who receive SSI benefits for mental retardation; (2) Brumfield's premature birth and very low birth weight; (3) the use of psychotropic medication, such a Valium, on a daily basis by Brumfield's mother prenatally, in addition to very little prenatal care; and (4) Brumfield's exposure to extreme stress and physical and emotional abuse during his developmental years.

A comparison of the newly-presented evidence to the evidence Brumfield submitted in his state post-conviction proceedings indicates that Brumfield's case falls somewhere between the scenarios in *Morris* and *Moore*. While Brumfield identified the AAMR criteria for mental retardation in his amended post-conviction relief application and submitted evidence as to his intellectual functioning and social and developmental background, the evidence he supplied did not fulfill the AAMR criteria, and his counsel merely asserted a conclusory allegation that the criteria were satisfied. Unlike the petitioner in *Morris*, Brumfield did not submit to the state court a sworn affidavit by an expert opining that, "given the opportunity and resources, intellectual tests would confirm" his mental retardation.

Nevertheless, Brumfield has been diligent and consistent in arguing his mental retardation claim since the *Atkins* decision was rendered in 2002, and his counsel, on at least three (3) occasions during his post-conviction proceedings, specifically requested sufficient funds for investigation into the facts and for the

retention of experts, similar to the petitioner in *Morris*.[17] Had such funding requests been considered

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[17] On pages 1-6 of his amended habeas petition, Brumfield specifically discusses the fact that he was not given an opportunity to develop and uncover facts supporting his claims during his post-conviction proceedings, despite several requests to do so. *See*, Original Application for Post-Conviction Relief; Expedited Motion for Order on Petition for Post- Conviction Relief; First Amended Petition for Post-Conviction Relief; and Application for Supervisory Writs to Louisiana Supreme Court. He explains that he was represented by pro bono counsel during his state post-conviction proceedings, rather than by the Capital Post-Conviction Project of Louisiana ("CPCPL"), which receives funding from the Louisiana Indigent Defense Assistance Board ("LIDAB"). As a result, he did not have access to the funds of the LIDAB and had to litigate his requests for funding in the district court having jurisdiction over his post-conviction proceedings.

In December 2004, the Louisiana Supreme Court, in *State ex rel. Williams v. State*, 888 So. 2d 792 (La. 2004), found that there may be statutory violations in the manner in which funding was being allocated by the LIDAB to indigent capital defendants in post-conviction proceedings and specifically noted its interest concerning the LIDAB's adoption of a resolution to prohibit the provision of funds for expert witnesses to civil law firms handling capital post-conviction cases on a pro bono basis. Subsequent to *Williams*, the LIDAB implemented a rule setting forth guidelines for providing expert and investigative resources to all death row inmates, which now allows pro bono counsel representing death-sentenced inmates to acquire resources and funding needed for their cases. *See*, La. Admin. Code Title 22, Part XV, §201, *et seq.* However, the *Williams* decision, rendered on December 1, 2004, and the subsequent LIDAB rule were not handed down until over a month after Brumfield filed this habeas matter on November 4, 2004. Thus, in addition to the fact that the state trial court ignored Brumfield's requests for funding, Brumfield also did not get to take advantage of this change in the LIDAB's rules regarding funding in pro bono cases. *See, State ex rel. Robertson v. Cain*, 947

and granted by the state trial court, Brumfield likely would have provided to the state court the information and evidence that he now seeks to present to this Court regarding his *Atkins* claim. Instead, Brumfield's counsel's requests for expert funds were completely ignored by the trial court and never ruled upon prior to the trial court's denial of his post-conviction relief application, despite the fact that expert funding is permitted during post-conviction proceedings, particularly in capital cases.[18] As noted above, *Atkins* was not decided until 2002, during the course of Brumfield's post-conviction proceedings; it was therefore reasonable at that juncture for Brumfield's counsel to request additional time and funding for investigation and consultation with experts on the mental retardation issue. Thus, regardless of whether

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So. 2d 709 (La. 2007) (where the Louisiana Supreme Court remanded a case (that had been held in abeyance pending the evidentiary hearing on capital defendants' post-conviction funding requests in *Williams*) to the district court for further proceedings, after first allowing the defendant to seek funds from the LIDAB in accordance with La. Admin. Code Title 22, Part XV, §201, *et seq*).

[18] *See, State ex rel. Cage v. Whitley*, 593 So. 2d 375 (La. 1992)(staying execution to allow counsel the opportunity to make a showing of the need for expert assistance prior to filing a petition for post-conviction relief); *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287 (La. 1992) (ordering district court to provide funds for an expert to assist counsel in developing claims regarding mitigation of death-sentenced inmate, noting that petitioner is "entitled to an adequate opportunity to present his claim fairly"); *State v. Brown*, 566 So. 2d 967 (La. 1990)(ordering that funds for experts must be provided before petition is filed so that petitioner can avail himself of assistance in developing post-conviction claims).

the newly-presented evidence regarding Brumfield's *Atkins* claim "fundamentally alters" the claim in comparison to how the claim was presented in state court (rather than merely "supplementing" the claim), the Court nevertheless finds that such new evidence should be considered because Brumfield has demonstrated "cause" for his failure to present the new evidence to the state court (*i.e.*, lack of funding for experts) as well as "actual prejudice" if he is not allowed the opportunity to introduce such evidence herein (If such claim is deemed unexhausted herein, Brumfield will be procedurally barred from going back to state court and presenting his new evidence due to time bars under state law).[19] [20]

Accordingly, the Court finds that it is permitted to consider the additional evidence regarding Brumfield's *Atkins* claim contained in his amended habeas petition,

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[19] *See, Moore*, at 223, citing *Hillery*, 474 U.S. at 260, 106 S. Ct. 617 ("The failure to exhaust is a procedural bar to federal review that may be excused if the petitioner can demonstrate cause for the defaults and actual prejudice"); *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000) (A petitioner can also overcome a procedural default if he can show that "failure to consider the claims will result in a fundamental miscarriage of justice").

[20] The Court also notes that it has not been presented with any evidence suggesting that Brumfield "attempted to expedite federal review [of his *Atkins* claim] by deliberately withholding essential facts from the state courts." *Moore*, at 496. Because of a lack of funding, Brumfield did not have access, while in state court, to the "essential facts" concerning his *Atkins* claim that he now seeks to present herein -- another factor which mitigates in favor of allowing him to present new evidence to this Court.

and because he has now presented evidence sufficient to satisfy the three prongs of the AAMR definition of mental retardation and has thus established a prima facie case under *Atkins*, he is entitled to an evidentiary hearing on the issue of mental retardation.[21] *See, Moore*, at 499 (After holding that the district court erred in finding that the petitioner's presentment of new evidence to the federal court rendered his *Atkins* claim unexhausted, the Fifth Circuit remanded the matter to the district court to conduct an evidentiary hearing on the merits of the petitioner's claim). Prior to such evidentiary hearing being conducted, however, the State should be allowed the opportunity to conduct discovery and retain experts to rebut the *prima facie* case submitted by petitioner.

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[21] A court may grant an evidentiary hearing under 28 U.S.C. §2254(e) within its discretion when an applicant demonstrates that a factual predicate underlying his claims could not have been previously discovered through the exercise of due diligence, as in this case where the state trial court did not allow Brumfield the funding and opportunity to investigate his mental retardation claim during post-conviction proceedings. *See also, Koon v. Cain, et al*, No. 01-327-D, where this Court found that the fault for a petitioner's failure to establish the facts he sought to prove during state post-conviction proceedings rested with the trial court, not with the petitioner, and that the allegations regarding the errors in lawyering, if proven, were serious enough to warrant the attention at a hearing in federal court.

B. The State's "relation back" argument concerning the claims in Brumfield's amended habeas petition:

The State also opposes Brumfield's amended habeas petition on the ground that the claims asserted in that petition do not "relate back" to his original habeas corpus petition filed nearly three years ago for purposes of timeliness under AEDPA. However, that argument lacks merit. In support of its "relation back" argument, the State relies upon *Mayle v. Felix*, 545 U.S. 644, 125 S. Ct. 2562, 162 L.Ed.2d 582 (2005). In that case, a petitioner, who was convicted in a California state court timely filed an initial habeas application in federal court asserting a Confrontation Clause challenge to the admission of a videotaped prosecution witness's testimony. Then, over five months after the expiration of AEDPA's one year time limit, the petitioner filed an amended habeas petition asserting an entirely different claim, a Fifth Amendment objection to the admission of certain inculpatory statements he had made during pretrial police interrogation.

The Supreme Court noted that Fed. R. Civ. P. 15(c)(2) provides that pleading amendments "relate back" to the date of the original pleading when the claim asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." It further explained that the majority of Circuits define "conduct, transaction, or occurrence" to allow "relation back" only when the claims added by the amendment "arise from the same core facts as the timely filed

claims," and not when the new claims depend upon events separate in "both time and type" from the originally raised episodes. The court therefore found that the petitioner's own pretrial statements, newly raised in his amended petition, did not relate back to the filing date of the original petition, which concerned a prosecution witness's videotaped statements because the two claims were separated in both time and type.

By contrast, although Brumfield seeks to add new evidence relative to his *Atkins* claim through his amended habeas petition, such evidence nevertheless relates to the claim that he presented in his original habeas petition, and both the *Atkins* claim in his original habeas petition and the *Atkins* claim in his amended habeas petition concern the same event in time, *i.e.*, the trial court's decision to deny him a hearing on the issue of mental retardation.[22] Accordingly, because this case is distinguishable from *Mayle*, the claims in Brumfield's amended habeas petition "relate back" to the filing date of his original habeas petition.

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[22] Similarly, even though Brumfield seeks to introduce new evidence relative to Claim Nos. 2 and 3 of his amended habeas petition (*i.e.*, his claims that lethal injection violates the Eighth Amendment and that his conviction and sentence were obtained with a coerced confession), he nevertheless asserted those claims at pages 35 and 37 of his original habeas petition).

C. Should the Court consider the newly-presented evidence relating to Claim Nos. 2 (lethal injection claim) and 3 (coerced confession claim) of Brumfield's amended habeas petition?

Even if the claims in Brumfield's amended habeas petition "relate back" to the filing date of his original habeas petition, the Court nevertheless finds that it should not consider the additional evidence concerning the second and third claims asserted in Brumfield's amended habeas petition because such additional evidence certainly does "fundamentally alter" those claims as compared to how they were presented in state court. Relative to both of those claims, in state court, Brumfield submitted only a single paragraph of conclusory allegations in his post-conviction relief applications with no evidentiary or jurisprudential support. He did the same in his initial habeas petition filed with this Court. However, in his amended habeas petition, Brumfield provides twenty-nine pages of argument concerning his lethal injection claim and four pages relative to his coerced confession claim. Additionally, he refers to extensive legal research and evidence, which could have been obtained by his state post-conviction counsel without the necessity of expert assistance (as distinguished from his *Atkins* claim, where expert assistance was needed to fully develop his arguments for post-conviction relief). Certainly, in the over three years of time between the filing of his initial and amended applications for post-conviction relief, his state counsel could have investigated and accumulated much of the information contained in his

amended habeas petition for the state court's review. For example, as the State explains in its present opposition, the *Code v. Cain* case upon which Brumfield relies heavily in his amended habeas petition relative to the lethal injection issue went to evidentiary hearing in 1999. However, Brumfield's state counsel failed to address the *Code* claims in Brumfield's 2000 and 2003 post-conviction relief applications, and Brumfield failed to reference that case in his 2004 habeas application with this Court. Other medical, jurisprudential, and historical evidence cited in support of Brumfield's lethal injection claim also appears to have been available at least prior to the filing of his amended post-conviction relief application in 2003.

As to Brumfield's coerced confession claim, references are simply made to information contained in the trial transcript, which was certainly available to Brumfield's post-conviction counsel. Although Brumfield's present counsel contends that he has been unable to obtain records from two *ex parte* hearings for funding involving a forensic audio analyst because of the necessity of a court order, such hearings occurred in 1993, and that information therefore also could have been obtained by post-conviction counsel had he requested it. Accordingly, the Court finds that the additional evidence relative to the final two claims in Brumfield's amended habeas application was not fairly presented to the state court for consideration (not exhausted) and therefore will not be considered by this Court, and as explained above, such claims (which, in the original habeas petition, were part of Claim No. 5,

alleging cumulation of error), should be dismissed as procedurally barred.[23]

D. Claim No. 3 of Brumfield's original habeas petition: Ineffective Assistance of Counsel:

The "clearly-established federal law" that applies to Brumfield's claim of ineffective assistance of counsel is the U.S. Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Based upon the standards set forth in *Strickland*, the court has no authority to grant habeas corpus relief if it concludes only that, in its independent judgment, the state court's application of *Strickland* is erroneous or incorrect. *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002). Instead, the question is whether the state court's decision involved an unreasonable application — and not merely an incorrect application of *Strickland*. *Id.*

In *Strickland*, the Supreme Court held that a petitioner who claims ineffective assistance of counsel must affirmatively demonstrate both that:

(1) his counsel's performance was "deficient", *i.e.*, that counsel made errors so serious that

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[23] Since the Court has determined that Claim Nos. 2, 4, and 5 of Brumfield's original habeas petition should be dismissed as procedurally barred, that Claim No. 1 of Brumfield's original and amended habeas petitions (*i.e.*, his *Atkins* claim) requires an evidentiary hearing, and that the evidence accompanying Claim Nos. 2 and 3 of Brumfield's amended habeas petition should not be considered, the only remaining claim for the Court to address is Claim No. 3 of his original habeas petition concerning his allegations of ineffectiveness of counsel.

> counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and
>
> (2) the deficient performance prejudiced his defense, *i.e.*, that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial where the result is reliable.

466 U.S. 668, 686, 104 S. Ct. 2052, 2064.

To satisfy the deficiency prong of the *Strickland* standard, the petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. *E.g.*, *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986). The reviewing court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence and that, under the circumstances, the challenged action might be considered sound trial strategy. *E.g.*, *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988). The court, therefore, must make every effort to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time of trial. *Martin*, 796 F.2d at 817. Great deference is given to counsel's exercise of his professional judgment. *Bridge*, 838 F.2d at 773; *Martin*, 796 F.2d at 816. The court essentially must determine whether there was a gap between what counsel actually did and what a reasonable attorney would have done under the circumstances. *Neal v. Puckett*, *supra*.

If the petitioner satisfies the first prong of the *Strickland* test, his petition nonetheless must affirmatively demonstrate prejudice from the alleged errors. *Earvin v. Lynaugh*, 860 F.2d 623, 627 (5th Cir. 1988). To satisfy the prejudice prong of the *Strickland* test, it is not sufficient for the petitioner to show that the alleged errors had some conceivable effect on the outcome of the proceeding. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067. Rather, the petitioner must show there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Martin*, 796 F.2d at 816. The habeas petitioner need not show that his counsel's alleged errors "more likely than not" altered the outcome of the case, he must instead show a probability that the errors are "sufficient to undermine confidence in the outcome." 796 F.2d at 816-17.

Brumfield's various allegations of ineffective assistance of counsel in Claim No. 3 of his original habeas petition were reviewed in detail by the state court at the post-conviction relief hearing, at which time the trial judge made the following findings:

> Claim Number 3 is ineffective assistance of counsel . . . and is actually broken down into several sub-parts. The first part being that the penalty phase counsel was not properly qualified for the trial of this case. In support of that in the application the defendant claims that — or actually quotes Marty White as the defense attorney talking about this being his first capital case. The record's clear that trial counsel was Ed Greenlee and Tyrone Brown, and even

though Marty White was in it for a while he did withdraw and was replaced by Tyrone Brown. Therefore, that claim is without merit and definitely does not meet the Strickland standard. In Section A, the application also argues that it was ineffective assistance of counsel because trial counsel argued against the death penalty instead of presenting mitigating evidence. The record's clear there was mitigation evidence presented, and it's true the defense attorney did argue against the death penalty. The court sees that as a strategic decision on the part of the defense attorney and, therefore, that would not meet Strickland. It does not state a claim that would entitle the petitioner to relief, so that is also dismissed. Section B, entitled counsel failed to investigate and prepare to offer mitigation evidence. However, I read the record or parts of the record and it's real clear that mitigation evidence was presented. There were six witnesses, two experts, his mother, his brother, his father, his, I think, fourth grade or second grade teacher, and it was probably as much mitigation evidence in that case as any I've seen.

Again, that's not supported by the record, and, therefore, it does not state a claim that would entitle him to relief and definitely does not meet the Strickland standard. Therefore, that one is dismissed. In Subsection B there was also a claim that counsel presented no information about how the defendant might cope with incarceration, and that was unsuccessfully

argued on appeal and, therefore, it is barred. Section 3 of ineffective assistance of counsel entitled counsel completely failed to present mitigating evidence. Again, six witnesses, the record shows there was other — or there was mitigating evidence including Dr. Bolter, Dr. Guinn, the mother, brother, the father, and the teacher, and, therefore, that is unsupported and will be dismissed being without merit.

Section D entitled counsel presented an unacceptable and irrelevant argument in the penalty phase. This is that — the debate of the argument is that the defense attorney should have argued more about mitigating factors and less about the death penalty in general. Again, this is strategy and definitely would not meet the Strickland standard and, therefore, is dismissed.

Section E is counsel failed to rehabilitate the social worker on the issue of her attitude toward the death penalty. This is another matter that goes to strategy, and I read this and I kind of wondered. I'm not sure whether that's even possible that she could be rehabilitated on the death penalty. The fact that she is against it, she is against it. She is sworn to tell the truth and I assume she tells the truth, and whether or not she is for or against the death penalty, I'm not sure how that would affect her testimony on the stand and the information that she relayed to the jury. In any event, that's something that would not meet the Strickland standard, and, therefore,

it's dismissed. And actually it's a strategy matter, so I'm not sure it's even ineffective assistance at all.

Subsection F entitled counsel failed to ensure a complete record of the trial court proceeding. This was raised on appeal, and the Supreme Court found that counsel failed to show any prejudice from the bench conferences not being on the record, and no evidence was listed in the petition indicating how the defense was prejudiced by this. So I'm going to agree with the Supreme Court on this. That's procedurally barred. It's already been handled on appeal, so it will be dismissed.

Subsection G, counsel failed to oppose and/or object to improper evidence offered by the state during the penalty phase. This has already been litigated on appeal, and the Supreme Court found that it was appropriately introduced by the State. So Subsection G, that claim is dismissed.

Subsection H, failed to raise issue of mental incapacity. From reviewing the record, those same reports, Dr. Bolter's report in particular, there is no evidence of incapacity, and since there is none, I'm not sure why any attorney would raise it if there is no evidence to support it. Therefore, that also — Subsection H, that claim will be dismissed.

Subsection I claims that the defense attorney failed to conduct proper examination of jurors.

> Cross-examination again is something that is really related to strategy, and I'm not sure specifically what the problem is or what the alleged problem with the cross-examination — or I should say proper examination of the jurors. Although the record, I believe there was two weeks of voir dire and I can't remember how many pages of testimony taken, and it does appear that they were pretty aggressive in examining the jurors. I fail to see how the defense was prejudiced at all. It definitely does not meet the Strickland standard and, therefore, the claim in Subsection I is also dismissed.

See, Post-Conviction Relief Hearing transcript, Pages 4-7, 10.

The Court will now consider whether the trial court's determinations at Brumfield's post-conviction hearing were unreasonable in light of the standards set forth in *Strickland*. In his first claim, Brumfield contends that his penalty phase counsel, Marty White, lacked experience in trying capital cases. In support of that contention, Brumfield quotes a portion of the transcript from an *ex parte* hearing that occurred on April 28, 1993, Vol. III, p. 609, where Mr. White indicated that he would "cut his teeth" on Brumfield's case because it was his "first capital case." However, the Court's review of the record indicates that Mr. White did not serve as Brumfield's counsel at trial or during the sentencing proceedings. The sentencing hearing transcript reflects that Brumfield was actually represented at that hearing by Edward Greenlee and

Tyrone Brown.[24] Accordingly, Brumfield's argument in this regard lacks merit and does not meet the *Strickland* standard, as the trial court concluded.

Brumfield next claims that his counsel was ineffective because he argued against the death penalty during the sentencing phase rather than presenting mitigating evidence. The Court agrees with the state court's conclusion that Brumfield's counsel's decision to argue against the death penalty is a matter of strategy and does not fall below an objective standard of reasonableness as is required to find deficient performance under *Strickland*. Furthermore, the Court's review of the record indicates that defense counsel presented mitigating evidence during the penalty phase, including the testimony of Dr. Bolter and Dr. Guin, that of Brumfield's various family members, and that of his teacher, Karen Cross. As discussed in detail above, defense counsel elicited from those witnesses mitigating evidence, including but not limited to information regarding Brumfield's intelligence level, his disruptive homelife, potential abuse and neglect, his low birth weight, and his

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[24] Edward Greenlee was one of the defense attorneys appointed to represent Brumfield after Michael Mitchell informed the Court that he had a personal conflict with the case. *See*, Motion for Appointment of Additional Counsel filed 1/20/93). Greenlee began representing Brumfield as early as his arraignment in February 1993. Marty White actually withdrew from the case, and Tyrone Brown was then appointed as additional defense counsel for Brumfield. Brown was present in court representing Brumfield as early as July 1993. Brown and Greenlee represented Brumfield during both the guilt and sentencing phases of his trial.

educational history. Defense counsel's performance is not deficient simply because the jury did not find such evidence sufficiently persuasive to impose life imprisonment rather than the death penalty. Accordingly, the Court concludes that this claim is likewise without merit and should be dismissed.

Because the Court finds that defense counsel's decision to make general arguments regarding the death penalty in the penalty phase was a strategic decision under *Strickland* and that defense counsel presented adequate mitigating evidence during the penalty phase,[25] the Court also finds that Brumfield's

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[25] The Court's review of defense counsel's argument during the penalty phase indicates that counsel made arguments beyond general assertions of the wrongfulness of imposing the death penalty in Brumfield's case and, in fact, discussed a number of mitigating factors with the jury. He asked the jury to consider Brumfield's family and children and how the imposition of the death penalty would affect them; he pointed out why the expert testimony should lead to a sentence of life imprisonment rather than death; he reemphasized expert testimony indicating that Brumfield had memory and attention problems and a borderline IQ; he scrutinized the testimony of certain State witnesses; he pointed out that Brumfield was never convicted with regard to the 1989 shooting related to a drug deal; he discussed Brumfield's background, including abuse by his stepfather, having six stepfathers, being placed in fourteen schools, being placed in group homes from the age of 12, the types of medication Brumfield received at a young age, being born at a low birth weight and with "problems," issues relating to the breakup of his parents; the fact that Brumfield's mother was also from an abusive home and had an emotional detachment from her children; the fact that Brumfield's father was unable to give Brumfield the attention and direction that he needed because of "things in his life;" that Brumfield had "good sides" to him, such as "taking up for the underdog;" and the

contention that he was denied effective assistance of counsel because his counsel presented an "unacceptable and irrelevant argument in the penalty phase" should also be dismissed.

As to Brumfield's claim that his counsel was ineffective because he failed to rehabilitate Dr. Guin on the issue of her attitude with regard to the death penalty, the Court agrees with the trial judge's determination that this was a tactical decision on the part of Brumfield's penalty phase counsel. During the penalty phase, Dr. Guin indicated that she believed the death penalty to be "ineffective" because it "gets rid of the person that's been convicted of the crime." Vol. XVI, p. 109. A review of the record indicates that Brumfield's counsel actually tried to ask questions of Dr. Guin regarding the death penalty issue on redirect and was not permitted to do so by the trial court. Thus, technically, any failure on his part to ask further questions or "rehabilitate" Dr. Guin on that issue was not a result of deficient performance on his part.

Furthermore, the Court agrees with the state trial court that this was not necessarily an issue upon which Dr. Guin needed to be "rehabilitated." The fact that

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alleged decreasing level of disciplinary reports while Brumfield was in parish prison. Vol. XVI, pgs. 165-173. In sum, defense counsel did not simply make the argument that the death penalty is wrong, as Brumfield contends; he instead argued that the death penalty was not the appropriate punishment for Brumfield considering the various mitigating factors at issue. Such an argument is a strategic decision and could have been effective if the Court had found the mitigating evidence to be sufficiently persuasive.

Dr. Guin felt the death penalty is an "ineffective" method of punishment did not result in her being a less credible witness with regard to her evaluation of Brumfield's social history. She was not permitted to give an opinion as to whether or not she thought Brumfield should be sentenced to death; thus, she did not need to be rehabilitated regarding her opinion as to the effectiveness of that punishment. Finally, even if the failure to rehabilitate Dr. Guin regarding her opinion on the death penalty could be considered deficient performance by Brumfield's counsel, the Court finds that such conduct was not so significant to prejudice Brumfield's defense or so serious as to deprive him of a fair trial during the penalty phase, as is required to find ineffective assistance of counsel under *Strickland*.

With regard to Brumfield's allegation that his counsel was ineffective for failing to insure that a complete record of the trial court proceedings was produced, this issue was raised on appeal and fully considered by the Louisiana Supreme Court. Specifically, Brumfield complains about the failure of the trial court to transcribe several bench conferences which took place during the cross-examination of Eddie Paul (a cousin of Brumfield's co-perpetrator who alerted authorities about Brumfield's involvement in the murder) and during defense counsel's examination of an employee of the Louisiana State Police Crime Lab.[26] The Louisiana Supreme Court noted that a new

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[26] The first unrecorded conference during Paul's testimony occurred when defense counsel suggested that the witness may

have been previously incarcerated on charges other than those dealing with his failure to pay child support. After the conference, Brumfield's counsel abandoned the issue. The second conference occurred when the prosecutor objected to defense counsel's reading into the record a statement that Paul had given to the police because she had not been allowed to review the statement before it was read to the jury. The third conference occurred during cross-examination of Paul after defense counsel asked him if he remembered telling the police that nobody planned the crime at his residence, and Paul indicated that he could not have told the police that. When defense counsel began to read from Paul's recorded statement, the prosecutor objected, claiming that the portion of the transcript being read by defense counsel was not responsive and therefore did not impeach the witness's testimony. Following the conference, defense counsel did not pursue the alleged discrepancy between the witness's statement and his trial testimony. A fourth unrecorded conference occurred after defense counsel asked Paul if the police threatened to whip him when they arrested him in connection with the offense, and defense counsel again abandoned the issue after the conference. Two other unrecorded conferences occurred during Paul's testimony when the prosecutor objected to defense counsel's questions about events following Paul's arrest, asserting that they were irrelevant and lacked impeachment value.

The first unrecorded bench conference during the examination of the Louisiana State Police Crime Lab witness occurred after defense counsel asked the witness if he had an opinion about whether any .25-caliber bullets struck either of the victims. The State objected, asserting that the witness was not qualified to respond to the question, and the court sustained the objection following an unrecorded sidebar. Subsequently, defense counsel rephrased the question, and the expert responded. The second unrecorded conference took place in response to an objection by the prosecution to the witness's reading from a list of exhibits in order to testify which pieces he had examined. Following the conference, the witness testified that several of the items seized by the police were recognized as being irrelevant to the investigation.

trial may be ordered when "*material* portions of the trial record were unavailable or incomplete; however, a 'slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal' does not require reversal of a conviction." *See, State v. Brumfield*, 737 So. 2d 660, 669 (La. 1998), quoting *State v. Parker*, 361 So. 2d 226 (La. 1978). As to the bench conferences during Paul's testimony, the court concluded those conferences primarily concerned the relevancy of defense counsel's questions which did little to impeach Paul's testimony, and because the defendant failed to show that he was prevented from presenting any relevant evidence as a result of the unrecorded conferences, he did not establish prejudice. Relative to the conferences during the crime lab witness's testimony, the court noted that the witness ultimately answered defense counsel's questions, despite the conferences; thus, Brumfield again failed to demonstrate that any prejudice resulted from the failure to record the conferences. The Court finds that the Louisiana Supreme Court's conclusions in that regard are reasonable, and this claim should therefore also be dismissed for failure to demonstrate the prejudice prong of the *Strickland* standard.

Brumfield next claims that his counsel was ineffective in failing to oppose and/or object to improper evidence offered by the State during the penalty phase, including evidence of uncharged criminal conduct and "arguments of the State unsupported by any evidence." Brumfield argues that the State proceeded to present testimony of a victim of an armed robbery to which the defendant had pled and to

characterize Brumfield's "clicking" of a gun against that victim's head as a "misfire." Brumfield contends that his counsel was ineffective for failing to object to the victim's testimony or to the characterization of a "misfire."

Brumfield also argues that, when the Clinton Police Chief testified with regard to that armed robbery incident, the "limits of admissible other conduct evidence in the penalty phase were stretched beyond the breaking point," as the Police Chief testified that there had been a confession in that case and that Brumfield's assertions that the confession was coerced were false. Finally, Brumfield argues that his counsel should have objected to certain arguments that the State made in its closing arguments during the penalty phase, specifically the State's argument that the Motions to Suppress filed by Brumfield with regard to the armed robbery case and the present case were a basis for the death penalty, the argument that the armed robbery victim would have been killed but for a "misfire," and the argument that Brumfield had killed a drug dealer in 1989.

As noted by the trial judge, defense counsel's failure to object to the evidence and arguments made by the State is an issue which has already been presented and fully litigated on appeal, and the Louisiana Supreme Court found that the State's arguments and evidence were not improper. The Louisiana Supreme Court specifically stated the following with regard to the State's arguments concerning Brumfield's motions to suppress and Brumfield's confession related to the armed robbery case:

> In the present case, the prosecutor did not suggest that defendant or his attorney did anything improper in attempting to suppress the confession in the earlier case. Rather, the prosecutor pointed to record evidence that this case was not the first one in which defendant had unsuccessfully claimed a confession was coerced. Because the jury had already rejected defendant's claim of a coerced confession in the guilt phase of this case, we conclude that the comments about defendant's claim of a coerced confession in a different case did not inject an arbitrary factor into the jury's deliberations during the penalty phase. Furthermore, the prosecutor's statement about defense counsel's cross-examination of police officers was a fair comment pointing out the frequently used strategy of attempting to shift the focus from the accused to the accuser.

State v. Brumfield, 96-2667, (La. 1998), 737 So. 2d 660, 666. Because it has been determined that the prosecutor's conduct was not improper, the performance of Brumfield's counsel in failing to object to such proper conduct cannot be considered deficient.

Brumfield next contends that he was denied effective assistance of counsel because the issue of his mental capacity to proceed was never raised by his counsel. As support for this argument, he points out that Dr. Bolter wrote in his narrative report that there was a question as to whether defendant was "able to assist in his defense" and recommended that "it may be reasonable to treat [Brumfield] with an appropriate

stimulant medication in order to maximize his capacity to attend." Vol. II, p. 276. A review of Dr. Bolter's narrative report indicates that those statements have been taken out of context by the defendant. The full context of Dr. Bolter's comments are as follows:

> The issue of [Brumfield's] attentional difficulties also seems to be suggestive of an early attention deficit/hyperactivity disorder that is a combined type. This condition is not severe enough to interfere with his ability to assist counsel in his own defense. However, his attentional skills may be somewhat taxed during monotonous or repetitive courtroom activities and it may be reasonable to treat this patient with an appropriate stimulant medication in order to maximize his capacity to attend.
>
> Additionally, the results of the Georgia Competency Test yielded a raw score of 40, suggesting that he has adequate simple knowledge of the courtroom and proceedings, as well as the charges, consequences and recollection of the events leading up to his arrest to be judged competent for trial. The Bennett criteria were also reviewed and he has an awareness of the nature of the proceeding against him and the ability to assist in his own defense. No other specific accommodations need be made in considering his current capacity to assist counsel.

Vol. II, p. 276. Based upon the explicit language of Dr. Bolter's report, Brumfield had the mental capacity to proceed at trial, and there is no evidence in the record

indicating that Brumfield was unable to assist his counsel prior to or during trial. The fact that stimulant medications may have been recommended to improve Brumfield's attention span during trial did not indicate that he was incompetent or unable to understand and assist in the proceedings against him. Because no evidence of incompetency exists, the failure of Brumfield's counsel to raise such an issue is not deficient conduct under *Strickland*.

Finally, Brumfield argues that his counsel was ineffective for failing to conduct a proper examination of prospective jurors during voir dire. He contends that there was a "wholesale lack of interaction with prospective jurors on the question of the death penalty," that jurors were not given "any information on statutory mitigators to determine whether individual prejudice would prevent or impair them from being considered," and that prospective jurors were not asked "whether the offense itself, without regard to the character and propensities of the defendant, would cause them to automatically vote for a death sentence."

Voir dire in the trial court proceedings occurred from June 12, 1995 through June 26, 1995, and the voir dire transcript indicates that jurors were thoroughly questioned regarding their opinions as to the death penalty and advised about statutory mitigators.[27] In

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[27] The Court has closely reviewed the voir dire proceedings contained in the state court transcript and finds that the prospective jurors were more than adequately advised and questioned regarding the law and burden of proof pertaining to the charge of first degree murder and for the imposition of the death

view of this questioning, the Court does not find that defense counsel's conduct during voir dire was deficient, and this claim should likewise be dismissed for failure to meet the standards set forth in *Strickland*.

In sum, the Court finds that, with the exception of Brumfield's claim that he was entitled to an evidentiary hearing on the issue of mental retardation, the

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penalty. The areas of discussion/questioning included but were not limited to: the prospective jurors' opinions concerning capital punishment; a detailed explanation of the legal requirements for imposition of the death penalty (including the State's burden of proving at least one aggravating factor and the obligation to consider mitigating evidence); the fact that, even if an aggravating circumstance is proven, the law does not require imposition of the death penalty; specific discussion of mitigating factors and the benefits of a life sentence over the death penalty; thorough discussion of the reasonable doubt burden of proof and the presumption of innocence; discussion of prospective jurors' general feelings on crime in the community (attendance at community crime watch meetings) and regarding police; the impact of the State's failure to present the murder weapon as evidence; issues relating to credibility of police officers as witnesses and the coercion of confessions; the difference between circumstantial and direct evidence; the defendant's right to remain silent and not testify or present any evidence at trial; the impact of the length of deliberations in a capital case; the prospective jurors' opinions regarding a defendant's acquittal based upon a "technicality" or "loophole;" general feelings about the justice system and attorneys; the prospective jurors' ability to put aside information they received through the news media or their preconceived notions regarding the crime and/or Brumfield's guilt at the time of deliberations and consider only the evidence presented at trial; and any relationships the prospective jurors had to the victim, the victim's family, or potential witnesses.

presumed correctness of the state court's decisions on his remaining claims regarding ineffective assistance of counsel has not been rebutted. Brumfield has failed to present clear and convincing evidence that, in adjudicating those remaining claims, the state court unreasonably applied federal law and/or unreasonably determined the facts in light of the evidence presented in his state court proceedings. *See*, 28 U.S.C. 2254(d)(1)-(2) and (e)(1). Accordingly, Brumfield's ineffective assistance of counsel claims should be dismissed.

RECOMMENDATION

For the above reasons, it is recommended that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (R. Doc. 1) filed by petitioner, Kevan Brumfield, be **GRANTED IN PART**, in that petitioner is entitled to an evidentiary hearing relative to his *Atkins* claim, and **DENIED IN PART**, in that all of the petitioner's remaining claims should be dismissed with prejudice. It is further recommended that, prior to an evidentiary hearing being conducted relative to petitioner's *Atkins* claim, the State be allowed the opportunity to conduct discovery and retain experts to rebut the *prima facie* case submitted by petitioner.

Signed in chambers in Baton Rouge, Louisiana, April 15, 2008.

MAGISTRATE JUDGE
CHRISTINE NOLAND

Appendix E

Supreme Court of Louisiana.

Kevan BRUMFIELD

v.

STATE of Louisiana.

No. 2004-KP-0081.

Oct. 29, 2004.

In re Brumfield, Kevan;-Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. G, No. 1-93-865.

Denied.

Appendix F

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

SECTION II

STATE OF LOUISIANA NUMBER: 01-93-865

VERSUS

KEVAN BRUMFIELD

MOTIONS

Thursday, October 23, 2003

THE HONORABLE RICHARD D. ANDERSON,
JUDGE PRESIDING

Appearances,

Premila Burns and Monisa Thompson,
for the State of Louisiana
Richard W. Westling, for the Defendant

FILED 10-28-03

/s/

DY. Clerk of Court

REPORTED BY: Krystal L. Rodrigue, C.C.R.

Thursday, October 23, 2003

REPORTER'S NOTE: Kevan Brumfield, Defendant, was present in court with counsel, Richard Westling. Premila Burns and Monisa Thompson, Assistant District Attorneys, were present on behalf of the State of Louisiana.

THE COURT: I guess we need to start off by making appearances.

MR. WESTLING: Your Honor, Richard Westling on behalf of Kevin Brumfield who is present in court.

MS. BURNS: Premila Burns for the State of Louisiana.

MS. THOMPSON: And Monisa Thompson for the state.

THE COURT: All right. Well, we are here on a post-conviction relief petition filed by Mr. Brumfield. Mr. Brumfield has actually filed two, the original and also an amended, and it's my understanding the amended petition incorporates everything in the original.

MR. WESTLING: That's correct, Your Honor.

THE COURT: Even though they kind of double up and state some of the same things.

MR. WESTLING: That's correct. One was really designed to replace the other, if you will, rather than having to deal with two separate documents throughout the proceeding.

THE COURT: All right. So I just want to make it clear for the record, really all we need to deal with today is the amended petition?

MR. WESTLING: That's correct.

THE COURT: All right. All right. And the state has already filed a response, and there are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.

The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue — there was a lot of testimony by all of those in Dr. Jordan's report.

Dr. Bolter in particular found he had an IQ of over — or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't

carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

That brings us to Claim Number 2, which is the cumulative error. I've read that and the Claim, Number 2. He doesn't provide any evidence of error in that claim. There is no showing of how the accumulation of error in this case renders the conviction unconstitutionally reliable. It does not specify with reasonable particularity the factual basis and does not allege a claim which if established would entitle the petitioner to relief, so that claim is dismissed.

Claim Number 3 is ineffective assistance of counsel, and ineffective assistance of counsel is actually broken down into several sub-parts. The first part being that the penalty phase counsel was not properly qualified for the trial of this case. In support of that in the application the defendant claims that — or actually quotes Marty White as the defense attorney talking about this being his first capital case. The record's clear that trial counsel was Ed Greenlee and Tyrone Brown, and even though Marty White was in it for a while he did withdraw and was replaced by Tyrone Brown. Therefore, that claim is without merit and definitely does not meet the Strickland standard. In section A, the application also argues that it was ineffective assistance of counsel because trial counsel argued against the death penalty instead of presenting mitigating evidence. The record's clear there was mitigation evidence presented, and it's true the defense

attorney did argue against the death penalty. The court sees that as a strategic decision on the part of the defense attorney and, therefore, that would not meet Strickland. It does not state a claim that would entitle the petitioner to relief, so that is also dismissed. Section B, entitled counsel failed to investigate and prepare to offer mitigation evidence. However, I read the record or parts of the record and it's real clear that mitigation evidence was presented. There were six witnesses, two experts, his mother, his brother, his father, his, I think, fourth grade or second grade teacher, and it was probably as much mitigation evidence in that case as any I've seen.

Again, that's not supported by the record and, therefore, it does not state a claim that would entitle him to relief and definitely does not meet the Strickland standard. Therefore, that one is dismissed. In Subsection B there was also a claim that counsel presented no information about how the defendant might cope with incarceration, and that was unsuccessfully argued on appeal and, therefore, it is barred. Section 3 of ineffective assistance of counsel entitled counsel completely failed to present mitigating evidence. Again, six witnesses, the record shows there was other — or there was mitigating evidence including Dr. Bolter, Dr. Guinn, the mother, brother, the father, and the teacher, and, therefore, that is unsupported and will be dismissed being without merit.

Section D entitled counsel presented an unacceptable and irrelevant argument in the penalty phase. This is that — the debate of the argument is that the defense attorney should have argued more

about mitigating factors and less about the death penalty in general. Again, this is strategy and definitely would not meet the Strickland standard and, therefore, is dismissed.

Section E is counsel failed to rehabilitate the social worker on the issue of her attitude toward the death penalty. This is another matter that goes to strategy, and I read this and I kind of wondered. I'm not sure whether that's even possible that she could be rehabilitated on the death penalty. The fact that she is against it, she is against it. She is sworn to tell the truth and I assume she tells the truth, and whether or not she is for or against the death penalty, I'm not sure how that would affect her testimony on the stand and the information that she relayed to the jury. In any event, that's something that would not meet the Strickland standard, and, therefore, it's dismissed. And actually it's a strategy matter, so I'm not sure it's even ineffective assistance at all.

Subsection F entitled counsel failed to ensure a complete record of the trial court proceeding. This was raised on appeal, and the supreme court found that counsel failed to show any prejudice from the bench conferences not being on the record, and no evidence was listed in the petition indicating how the defense was prejudiced by this. So I'm going to agree with the supreme court on this. That's procedurally barred. It's already been handled on appeal, so it will be dismissed.

Subsection G, counsel failed to oppose and/or object to improper evidence offered by the state during the penalty phase. This has already been litigated on appeal, and the supreme court found that it was

appropriately introduced by the state. So Subsection G, that claim is dismissed.

Subsection H, failed to raise issue of mental incapacity. From reviewing the record, those same reports, Dr. Bolter's report in particular, there is no evidence of incapacity, and since there is none, I'm not sure why any attorney would raise it if there is no evidence to support it. Therefore, that also — Subsection H, that claim will be dismissed.

Subsection I claims that the defense attorney failed to conduct proper examination of jurors. Cross-examination again is something that is really related to strategy, and I'm not sure specifically what the problem is or what the alleged problem is with the cross-examination — or I should say proper examination of the jurors. Although the record, I believe there was two weeks of voir dire and I can't remember how many pages of testimony taken, and it does appear that they were pretty aggressive in examining the jurors. I fail to see how the defense was prejudiced at all. It definitely does not meet the Strickland standard and, therefore, the claim in Subsection I is also dismissed.

THE DEFENDANT: Excuse me. May I say something? If you're going to deny all of this here, I don't even need to be here, you know.

THE COURT: Well, you need to be there, and you need to be quiet or we are going to put you in the tank —

THE DEFENDANT: I don't need to do nothing.

THE COURT: — and you can listen to this.

THE DEFENDANT: I don't need to do nothing. You're prejudiced against me. I know this. You ain't going to change your damn mind. I ain't going to sit here and let you deny all of this bullshit.

THE COURT: You know what, you're right. You're not going to sit here.

THE DEFENDANT: This is bullshit. That's right.

THE COURT: We need to take him to the tank right now.

THE DEFENDANT: This is bullshit. You know it, mother fucker. You're prejudiced. I know this. That's why you are doing all this against Todd Lee. You think I don't know? I know what kind of judge you is. You're a fucking house judge. That's right.

REPORTER'S NOTE: At this time the defendant was escorted out of the courtroom.

THE COURT: Just so the record is clear, do you have any objection to your client being removed from the court based on the demonstration that he just presented?

MR. WESTLING: Your honor, I don't know how to answer that. Obviously, he has a right to be here, but I understand the court. I heard what was said. I don't approve of it. I can only say that my sense is that you're issuing a ruling which probably could be issued in writing as well, so I'm not sure there is any requirement that he be present.

THE COURT: Well, just so the record is real clear, I think in the tank — and Mr. Rivers, why don't you ask the deputy to stand in here. I believe they can play this in the tank so he can at least hear this, and on the other hand we don't have to hear him. And if at any time you need to go confer with him, feel free.

MR. WESTLING: I understand, your honor.

THE COURT: Just ask, and we'll let you do that.

MR. WESTLING: Okay.

REPORTER'S NOTE: At this time the deputy entered the courtroom.

THE COURT: I think we have the capability to play this in the tank for him?

THE DEPUTY: I'm doing that as we speak, your honor. I have to get the inmates out of this tank so we can put him in there.

THE COURT: Just let me know when you're ready.

THE DEPUTY: Yes, sir.

REPORTER'S NOTE: At this time an in-court recess was taken.

THE COURT: We are ready?

THE DEPUTY: Yes, sir.

THE COURT: We are being piped into the tank so the defendant can hear. All right. The very last part of the ineffective assistance of counsel, counsel for the defendant filed a response to the state's response to the application and set out in there that the defense

attorney, Tyrone Brown, was disbarred in March of 2002, and that was for assisting a nonlicensed person in practicing law. That was in 2002. It doesn't have anything to do with him actually representing this defendant, and it sounds like it was unrelated to him representing defendants, but instead allowed somebody else to practice law who is not licensed. Therefore, that does not state a ground even if established that could result in the defendant being granted relief, so that one is also dismissed.

Claim Number 4 is jury misconduct and lack of impartiality. Paragraph 89 of the application, the defendant claims that anti-defense gestures were made by a juror and reports of familiar relationship being demonstrated following the jury's return of the death sentence. This is not grounds for post-conviction relief, even if it was set out with enough particularity, and, therefore — well actually — and it's also something that should have been raised on appeal, and I guess I'll ask Mr. Westling, why wasn't it raised on appeal?

MR. WESTLING: I don't know the answer to that, your honor. I think to be very blunt about it, I think there's issues as to whether the record itself reflects the event or whether that's simply what was observed in court, and I would have brought a witness in to testify that it had occurred, but I haven't found on the record where it was objected to or otherwise. So I imagine that because the direct appeal is limited to the record that exists at the time that would be the reason why there wouldn't be the issue raised before the supreme court.

THE COURT: All right. Well, the bottom line is that does not fall within the grounds for post-conviction relief, in any event, and, therefore, that will be dismissed based on that. The second part of his claim is that the jury lacked impartiality due to pretrial publicity. The issue of a venue change was unsuccessfully raised on appeal, and in addition to that, again, it is also not grounds for post-conviction relief as set out in 930.3. Therefore, that one will be dismissed.

Claim Number 5 is a group of claims, paragraphs 91 through 100, which each set out claims that are I guess separate from each other, and I'll take those one at a time; although, I will say that my reading them, none of these are actually claims that fall within the enumerated grounds for post-conviction relief, and some have already been raised on appeal. Paragraph 91 refers to the coerced confession. That issue was raised on appeal. Therefore it will be dismissed. Paragraph 92, jury charge and verdict form failed to include various lesser included offenses, for example, attempted first degree murder, et cetera. I'm not sure why that wasn't raised on appeal, which would be the time to challenge the juror — I'm sorry, the jury charge, but the law is clear that that is not a responsive verdict set out in the code of criminal procedure. And, again, just so the record is clear, why wasn't that raised on appeal?

MR. WESTLING: I can't answer that, judge. Not having handled the appeal makes that difficult to understand.

THE COURT: That one will also be dismissed. Paragraph 93, prosecutor improperly presented and

relied on improper aggravating factors. Again, this is not grounds for post-conviction relief. It's something that should be handled on appeal. Can you answer why it was not?

MR. WESTLING: I'm sorry?

THE COURT: Do you have any reason why it was not?

MR. WESTLING: No, I don't.

THE COURT: All right. That is dismissed. Paragraph 94, the trial court improperly restricted the defendant's presentation of mitigating circumstances. That was raised on appeal unsuccessfully. Therefore, that is dismissed. Paragraph 95 alleges there was no indication that the jury's verdict was unanimous. Again, this is not something that's set out in the grounds for post-conviction relief. It's also something that should have been handled on appeal, and I assume —

Mr. WESTLING: The same answer.

THE COURT: — You don't know why.

MR. WESTLING: Exactly, your honor.

THE COURT: In any event, that is dismissed. It's not grounds and should have been handled on appeal. The trial court failed to properly instruct the jury. The same response, it's not grounds under 930.3 and should have been handled on appeal. And I assume, again, you didn't handle it. You can't answer why it was not.

MR. WESTLING: That's correct, your honor.

THE COURT: That one is dismissed. Paragraph 97, prejudicial hearsay concerning other crimes was improperly allowed. That was argued on appeal and litigated on appeal, and, therefore, that will be dismissed. Paragraph 98, hearsay issue relating to the state's cross-examination of social worker. That was appealed and litigated on appeal, and, therefore, that will be dismissed. Paragraph 99, reasonable doubt instructions were constitutionally inadequate. This was raised on appeal. Therefore, it will be dismissed. Paragraph 100, the trial court allowed the state to attack the defendant's character on an improper basis. And, again, that was appealed, and like all of these, paragraph 91 through 100, it's not proper grounds for post-conviction relief.

In the defendant's reply to the state's response to the amended petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under 930.3, and it's not set out with enough particularity. Therefore, it will be dismissed. And since the amended petition replaced the original petition I think that's all of the claims that are being addressed at this time.

MR. WESTLING: I think that's correct.

THE COURT: Do you have anything else?

MR. WESTLING: Your honor, to be honest with you, procedurally I'm not sure what I'm supposed to do

to make sure I'm preserve the issue, so I'm simply going to object to the ruling to the extent that needs to be in the record at all. I would very briefly note that I think a number of the rulings the court made have been determined under Strickland standard as to strategy calls. We simply suggest that it's not appropriate to make that decision without an evidentiary hearing, that it's appropriate to have testimony from the lawyers involved to determine whether, in fact, those were strategic calls. But other than that I would just generally object so that I could do whatever I have to do next.

THE COURT: Just so the record is clear, and I'm sure it already speaks for itself, but on some of those, I did say —

MR. WESTLING: They are dual grounds. I understood.

THE COURT: — Dual grounds, and even if it got past the first one, it still wouldn't be Strickland.

MR. WESTLING: Sure.

THE COURT: All right. That's it.

MR. WESTLING: Your honor, one other matter. I don't know, again, just by way of information how the best way — will the court have the transcript of this ruling transcribed so that I can take whatever next step I need to take?

THE COURT: Right. I believe we'll have the transcript transcribed, and we'll send, of course, the parties a copy and also the custodian.

MR. WESTLING: All right. Thank you.

THE COURT: All right. With that, court's adjourned.

MR. WESTLING: Your honor, the one other thing Ms. Thompson was kind enough to tell me, we need a return date for that I guess transcript — or ruling so that we know when time begins to run.

MS. THOMPSON: If you decide to take up the issues, you need to get a return date from here, a 30 day return date, so you can file your brief in the supreme court.

MR. WESTLING: Okay. So I guess we need a 30 day return date so we can properly toll the time for the filing of any appeal.

THE COURT: What's 30 days? What's that date?

THE CLERK: That's a Sunday.

THE COURT: All right. Go to the next one.

THE CLERK: November 24th, the Monday.

THE COURT: Right.

THE CLERK: November 24th.

THE COURT: Anything else?

MR. WESTLING: No, your honor.

THE COURT: Court's adjourned.

(End of Proceedings)

Appendix G

Supreme Court of the United States

Kevan BRUMFIELD, petitioner,

v.

LOUISIANA.

No. 98-7702.

March 22, 1999.

Case below, 737 So. 2d 660.

Petition for writ of certiorari to the Supreme Court of Louisiana denied.

Appendix H

Supreme Court of Louisiana.

STATE of Louisiana

v.

Kevan BRUMFIELD.

No. 96–KA–2667.

Oct. 20, 1998.

LEMMON, Justice.

This is a direct appeal to this court from a conviction of first degree murder and a sentence of death. La. Const. art. V, § 5(D). The principal issues involve (1) the admission in the penalty phase of evidence of unrelated criminal conduct; (2) the prosecutor's reference to defendant's future dangerousness; (3) the prosecutor's reference in closing argument in the penalty phase to defendant's claim of a coerced confession in another case; (4) the court's discovery order requiring the defense to produce the report of a non-testifying expert; (5) the admission of the surviving victim's hypnosis-refreshed testimony; (6) the curtailment of defendant's attempts to impeach the surviving victim; (7) various claims concerning

ineffective assistance of counsel; and (8) the alleged failure of the court to properly preserve the record.[1]

Facts

On January 5, 1993, defendant, accompanied by Henri Broadway, went to a self-described psychic counselor to obtain a reading. Defendant, who was carrying a gun, told the psychic he planned to commit a robbery and wanted to know the best day to do so.

Two days later, a pair of armed robbers ambushed a grocery store manager who was being escorted to the bank by an off-duty police officer working a security detail. In the fusillade of bullets fired into the police unit, the officer was killed by five shots, but the store manager, although, suffering eleven bullet wounds, survived the attack.

The morning after the murder, defendant nervously told Eddie Paul that he had just "killed a son of a bitch." Paul also overheard defendant tell Broadway that it had been a waste of time because they did not obtain anything during the attempted robbery. Remembering a conversation a week or two earlier in which defendant, Broadway, and his cousin, West Paul, planned the robbery of a bank, Eddie Paul informed the police on January 10 that defendant had committed the murder.

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[1] Defendant's other assignments of error involve only settled principles of law and are treated in an unpublished appendix, which is attached to this opinion and is part of the official record.

The police apprehended defendant the next day. Upon interrogation, defendant originally denied any connection with the shooting, claiming he was with his brother when the crime occurred. However, when later informed that his brother had not corroborated his alibi, defendant gave a videotaped statement in which he admitted involvement in the crime, but claimed he acted as the getaway driver while West Paul and Broadway committed the robbery.

Based on that information, the police arrested West Paul and Broadway, who both gave statements about the crime inconsistent with defendant's claim that he acted only as the getaway driver. Confronted with that information, defendant gave a second videotaped interview in which he admitted shooting the victims. Several hours later, defendant also confessed to an armed robbery in Clinton, Louisiana.

The jury found defendant guilty as charged. After the penalty phase of the trial, the jury unanimously recommended a sentence of death, finding as aggravating circumstances that defendant was engaged in the perpetration of an attempted armed robbery, that the victim was a peace officer engaged in her lawful duties, and that defendant knowingly created a risk of death or great bodily harm to more than one person. Defendant has appealed his conviction and sentence.

Other Crimes Evidence

Defendant raises several issues relating to evidence of unrelated criminal conduct. Defendant first argues that the prosecutor improperly introduced evidence

during the penalty phase that defendant committed an unadjudicated attempted murder during the armed robbery in Clinton, Louisiana.

Prior to the trial of the present crime, defendant was charged with the Clinton crime and was convicted of armed robbery. In the penalty phase of the present trial, the prosecutor introduced a certified copy of the bill of information charging defendant with armed robbery, as well as the minutes of his conviction for the crime. The prosecutor also called the victim of the Clinton robbery, who testified that defendant, accompanied by defendant's brother and West Paul, robbed him at gunpoint in 1992, left him on the side of the road, put a gun to his head, "and the gun clicked."

La. Code Crim. Proc. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on the family members." Evidence of a prior conviction is admissible in the penalty phase of a capital case, whether or not the defendant puts his character at issue, because the capital sentencing statute puts his character at issue. *State v. Sawyer*, 422 So. 2d 95 (La. 1982), Accordingly, the evidence of the armed robbery conviction in this case clearly was admissible.

Defendant's complaint focuses on the admission of evidence of the conduct that arguably constituted attempted murder, as well as on the prosecutor's reference in closing argument to that unadjudicated conduct.

Rules governing the admission of evidence of unrelated and unadjudicated criminal conduct in penalty phase hearings to prove the defendant's character and propensities have evolved jurisprudentially. In *State v. Brooks*, 541 So. 2d 801 (La. 1989), this court approved the prosecutor's introduction in the case-in-chief in the penalty phase of two unrelated and unadjudicated murders when the trial judge had determined in a separate hearing that (1) the evidence of the defendant's commission of the unrelated criminal conduct was clear and convincing; (2) the proferred evidence was otherwise competent and reliable; and (3) the unrelated conduct had relevance and substantial probative value as to the defendant's character and propensities.

In *State v. Jackson*, 608 So. 2d 949 (La. 1992), this court established limitations on the types of evidence of unrelated and unadjudicated criminal conduct that may be introduced by the prosecutor in the case-in-chief in the penalty phase of a capital sentencing hearing. To be admissible, the evidence of unadjudicated criminal conduct must involve violence against the person of the victim, and the period of limitation for instituting prosecution must not have run at the time of the indictment of the accused for capital murder. *Id.* at 955.

In *State v. Comeaux*, 93–2729 (La. 7/1/97), 699 So. 2d 16, 22, this court declined to place significant restrictions on the amount of this type of evidence, as long as the evidence is highly relevant to the defendant's character and propensities. Nevertheless, this court warned that:

> [T]he judge, having already ruled at the pretrial hearing on the admissibility of evidence of the unadjudicated conduct, should cautiously consider the quantum of evidence necessary to convey the message to the jury that the defendant has engaged in other serious criminal conduct that the jury should consider in its determination of sentence, without shifting the jury's focus from its function of determining the appropriate sentence in the capital case to a focus on the defendant's involvement in other unrelated criminal conduct.

Id. at 23.

In the present case, the prosecutor gave defense counsel the required notice of intent to use other crimes evidence and presented evidence at the pretrial hearing that easily met the required clear and convincing standard. Moreover, the conduct involved violence against the person, and the statute of limitations had not run at the time defendant was indicted on the instant charge. Finally, the brief testimony of the victim of the Clinton robbery provided substantial probative value as to defendant's character and propensities. Accordingly, the court did not err in admitting the evidence of the unadjudicated criminal conduct that arguably constituted attempted murder.

Defendant contends, however, that the evidence of an attempted murder was improperly admitted because he was only charged with and convicted of armed robbery.

The *Jackson* decision prohibited introduction of evidence of the original charge when the defendant was convicted of a lesser crime. *Id.* at 954. Here, however, defendant was indicted for (and convicted of) armed robbery, and no evidence or prosecutor's comment suggested that defendant was ever charged with attempted murder. Moreover, as noted above, the testimony of the victim of the Clinton robbery did not violate the *Jackson* standards and was properly admitted into evidence. Finally, the prosecutor's comments in closing argument that defendant "put that gun to [the victim's] head and pull[ed] the trigger" during the Clinton robbery and that defendant would have killed the robbery victim "but for a gun misfiring" was proper argument based on the record and on fair inferences drawn from the record.

Defendant also complains about the admission of evidence of a previous murder attributed to defendant in a report by a sociologist consulted by the defense.

Defendant's mitigation expert, Dr. Cecile Guin, testified on her direct examination that during her investigation of defendant's social history she used a report prepared by Dr. Bryan Jordan, an expert who was consulted by the defense but did not testify. On cross-examination, Dr. Guin conceded that in her report she characterized defendant's criminal history as not "very lengthy or complicated." The prosecutor then directed Dr. Guin to a portion of her report stating defendant declared he had witnessed a drug deal and murder in 1989 and had "turned state's evidence" against the perpetrator, and questioned Dr. Guin on

defendant's participation in the 1989 event.[2] Referring to Dr. Jordan's report, the prosecutor pointed out the statement that defendant admitted that "he in fact ... did shoot at a drug user who had refused to pay and drove away in his car." Dr. Guin responded, "That is one of the conflicting reports that I read."

In her closing penalty phase argument, the prosecutor referred to the "1989 incident involving the killing of the drug dealer" and "the conflicting versions that [defendant] apparently gave Dr. Guin, and the other version in which he admitted his involvement in this case to Bryan Jordan, the person whose report was repeatedly referred to during the course of this case."

Because the defense admitted use of the Jordan report on direct, the prosecutor on cross-examination was entitled to inquire into defendant's role in the drug-related homicide referred to in the report. The *Jackson* limitations on admissibility of unrelated criminal conduct in the penalty phase apply only to the state's case-in-chief, not to relevant rebuttal evidence. *State v. Sepulvado*, 93–2692 (La. 4/8/96), 672 So. 2d 158, 165, *cert. denied*, 519 U.S. 934, 117 S. Ct. 310, 136 L.Ed.2d 227 (1996). Moreover, the prosecutor properly used the report to challenge Dr. Guin's conclusion that defendant's criminal history was not very lengthy. Under these circumstances, the prosecutor's questions about the Jordan report constituted proper cross-

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[2] The incident had not been mentioned by Dr. Guin on direct examination.

examination to impeach Dr. Guin's evaluation of defendant's prior criminal behavior.

Reference to Future Dangerousness

Defendant complains about a portion of the prosecutor's closing argument in the penalty phase referring to defendant's future dangerousness. In the complained-of portion of the argument, the prosecutor stated:

> As long as [defendant] lives, others are in jeopardy and in danger and you saw the records.... [T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with. He has already shown this as he waits for a trial on this charge, that he has not regard for anyone else, he has no regard for authority, he has no problem with brutalizing and killing police officers or battering them.

This court has stated that the "prosecutor's remarks about the societal costs of a life sentence, misspent tax dollars, future escapes, more killings by defendant, were improper." *State v. Busby*, 464 So. 2d 262, 267, (La. 1985), *sentence vacated on other grounds*, 538 So. 2d 164 (La. 1988). Without deciding whether a single statement in closing argument that the defendant, if released, may kill again would require reversal of the sentence in other cases, we note in this case that defendant's mitigation expert admitted a number of incidents in which disciplinary action against defendant had been taken since his incarceration. Therefore, the

prosecutor had a factual basis for the remarks in this case, and this portion of the closing argument did not inject an arbitrary factor into the proceedings.

Reference to Defendant's Claim of Coerced Confession in Unrelated Case.

Defendant argues that the prosecutor's comments in closing argument about defendant's attempts to suppress a confession in an unrelated case warrants a reversal of the penalty in this case.

In the closing argument in the penalty phase, the prosecutor emphasized that this murder involved the highest degree of aggravation, since it was premeditated as opposed to a spontaneous killing in the course of a robbery. The prosecutor noted that the planning of the crime was revealed in defendant's confession. While conceding that defendant asserted the confession was coerced, the prosecutor made the following argument against the claim of coercion:

> [T]he taped statements that you heard by the defendant which, ... he alleged to have been coerced, just as [the arresting officer in the Clinton robbery] told you that when he gave a taped statement concerning his crime against [the victim of the Clinton robbery] that he readily confessed to the same day, later on, again you hear the allegations. It's his M.O. He's street smart, he's savvy, and after he's confessed, what is he going to do but go back and attack the officers who've gone about doing their job,

giving him his rights and taking a proper statement?[3]

Later, the prosecutor referred to counsel's cross-examination of the state witnesses, stating, "during the course of this trial those very police officers who go about and try to protect us every day have been assailed, have been defamed through the allegations of this defendant when he is the person who is on trial."

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom, and to the law applicable to the case. La. Code Crim. Proc. art. 774. While the trial judge has broad discretion in controlling the scope of closing arguments, Louisiana jurisprudence on prosecutorial misconduct has allowed prosecutors wide latitude in choosing closing argument tactics. *See State v. Prestridge*, 399 So. 2d 564, 580 (La. 1981). Nonetheless, the prosecutor should refrain from making personal attacks on defense strategy and counsel. *See State v. Duplessis*, 457 So. 2d 604, 609 (La. 1984).

In the present case, the prosecutor did not suggest that defendant or his attorney did anything improper in attempting to suppress the confession in the earlier case. Rather, the prosecutor pointed to record evidence that this case was not the first one in which defendant

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[3] In the trial of the armed robbery committed by defendant in Clinton, the officer testified that defendant freely admitted the crime the day of the event, but later claimed involuntariness based on coercion.

had unsuccessfully claimed a confession was coerced. Because the jury had already rejected defendant's claim of a coerced confession in the guilt phase of this case, we conclude that the comments about defendant's claim of a coerced confession in a different case did not inject an arbitrary factor into the jury's deliberations during the penalty phase. Furthermore, the prosecutor's statement about defense counsel's cross-examination of police officers was a fair comment pointing out the frequently used strategy of attempting to shift the focus from the accused to the accuser.

Production of Report of Non–Testifying Expert

Defendant contends that the court erred when it granted a discovery motion and ordered his counsel to provide the prosecutor with the report prepared by Dr. Bryan Jordan whom defense counsel did not intend to, and in fact did not, call to testify at trial.

This court summarized an accused's discovery obligations regarding such reports in *State v. Touchet*, 642 So. 2d 1213, 1218–19 (La. 1994), stating:

> In Louisiana, the Code of Criminal Procedure recognizes that the onus of any criminal prosecution is upon the state, and that the state is not to receive any unfair advantages in the pretrial discovery process. La. C. Cr. P. arts. 724 and 725 provide for state discovery only of defense scientific or medical reports, and only after the defense has "opened the door" by its request for similar information in the possession of the state. La. C. Cr. P. art. 728 specifically forbids discovery of elements of anything but

> scientific and medical reports that were, in turn, first requested by the defense, and protects "statements made by ... witnesses or prospective witnesses [and] the names of defense witnesses or prospective defense witnesses" from discovery by the state. These provisions of the Code reflect a legislative recognition that the state should "shoulder the entire load" in a criminal prosecution and should not be allowed to circumvent the "burdens of independent investigation by compelling self-incriminating disclosures." *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55, 84 S. Ct. 1594, 1597, 12 L.Ed.2d 678 (1964).

Because defense counsel did not seek medical or scientific reports from the prosecutor, the trial court arguably erred when it ordered the defense to provide Dr. Jordan's report. The prosecutor's right to discovery is very limited. Under La. Code Crim. Proc. art. 725, "[t]he state is not entitled to discover the defendant's reports of physical and mental examinations unless the defendant has first been granted relief under Article 719," and then may discover only reports "of a similar nature" to those previously requested by the defense from the prosecutor. *State v. Rachal*, 362 So. 2d 737, 739 n.5 (La. 1978).

However, when Dr. Cecile Guin, the social worker-mitigation expert, testified in the penalty phase that she relied on, among other things, Dr. Jordan's report when she made her psychological evaluation of defendant, the prosecutor then became entitled to examine the report for possible impeachment material.

See State v. Williams, 445 So. 2d 1171, 1181 (La. 1984). Because the prosecutor eventually would have obtained possession of the report, the defense fails to show any prejudice resulting from the court's order to produce Dr. Jordan's report. *Cf. State v. Bourque*, 92–0968 (La. 7/1/93), 622 So. 2d 198, 239 (holding that the defendant, before being entitled to relief, must show prejudice resulting from the state's failure to comply with discovery procedure).

Hypnosis–Refreshed Testimony of the Surviving Victim

Defendant first contends that the court should not have admitted the testimony of the store manager who survived the shooting, because her recollection of the crime and her identification of Henri Broadway as one of the assailants occurred only after she had been hypnotized by the police.

Immediately after the assailants fired the barrage of shots into the police car, Broadway reached into the car to get the bag of money and was face-to-face with the store manager. Although she had received eleven bullet wounds, the manager drove off. When the manager immediately reported the crime to the 911 operator, she could not describe either of the assailants. Later, she gave a detailed description of the assailant who reached into the car, and at trial she gave the jury a detailed description of one of the perpetrators. There was no objection to the testimony or the identification.[4]

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[4] Because the store manager did not identify defendant, but only identified a co-assailant, defense counsel may have made a

Consequently, defendant waived any claim based on the erroneous admission of this guilt phase evidence. La. Code Crim. Proc. art. 841; *State v. Taylor*, 93–2201, p. 7, (La. 2/28/96), 669 So. 2d 364, 369, *cert. denied*, 519 U.S. 860, 117 S. Ct. 162, 136 L.Ed.2d 106 (1996).

The Curtailment of Defendant's Attempt to Impeach the Surviving Witness

Defendant also contends that the court erred by limiting impeachment of the store manager as to anti-psychotic medication she allegedly was taking.

Defense counsel questioned the manager in detail about medications prescribed for her after the incident. The manager listed "antianxiety" medication, "sleeping pills," and antidepressant medication taken for about a year after the murder. She stopped using the sleeping medication, but she began taking Prozac for depression about six months prior to trial. When defense counsel asked if she took some medications in doses larger than prescribed, the prosecutor objected. The court held a bench conference during which the prosecutor asserted that this line of questioning was irrelevant. Defense counsel responded that the witness first gave a description that did not describe Broadway and one year later identified Broadway as one of the robbers.

The court ultimately sustained the objection, explaining:

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strategic choice not to object to the hypnosis-refreshed identification. This issue perhaps would be more appropriately addressed in post-conviction proceedings.

> The jury has had the benefit of her description prior to her treatment. They've also had the benefit of her description subsequent to that treatment. They've had the benefit of the testimony regarding the medication that she's taking, and that's enough for the jury to make whatever decisions they're going to make about it. And again, that's all viewed against the backdrop that the description that you're talking about doesn't apply to your client.

As a general rule, a party may attack the credibility of a witness by examining him or her concerning any matter having a reasonable tendency to disprove the truthfulness of his or her testimony. La. Code Evid. art. 607 C. The subject matter of the attack, however, is limited by the relevancy standard of La. Code Evid. art. 403. Moreover, while La. Code Evid. art. 607 D provides that "extrinsic evidence to show a witness' bias, interests, corruption, or defect of capacity is admissible to attack the credibility of the witness," a witness cannot be cross-examined as to a fact which is collateral or irrelevant to the issue at hand merely for the purpose of contradiction or impeachment. *State v. Vessell*, 450 So. 2d 938 (La. 1984) (decided under former La. Rev. Stat. 15:494).[5] Finally, a trial court's ruling on the scope and extent of cross-examination should not be disturbed absent an abuse of discretion. *State v. Coleman*, 406 So. 2d 563 (La. 1981).

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[5] Article 607C was not intended to change Louisiana law, and reference to a prior decision is therefore warranted. La. Code Evid. art. 607, Official Comment.

In the instant case, defense counsel cross-examined the store manager extensively about the medications prescribed for her after the murder. The judge's ruling also correctly noted the manager identification did not directly implicate defendant in the crime, and defense counsel did not object to the identification at trial. Under these circumstances, defendant fails to show any prejudice resulting from the court's ruling which prevented him from questioning the manager further regarding the prescribed medications.

Ineffective Assistance of Counsel

Defendant contends that his trial attorneys rendered constitutionally deficient assistance in a number of areas.

A claim of ineffective assistance of counsel generally is more properly raised in an application for post-conviction relief than on appeal. *State v. Hamilton*, 92–2639 (La. 7/1/97), 699 So. 2d 29, *cert. denied*, 522 U.S. 1124, 118 S. Ct. 1070 (1998). In post-conviction proceedings, the district judge can conduct a full evidentiary hearing on the matter. However, when the record contains evidence sufficient to decide the issue, the appellate court may consider the issue in the interests of judicial economy. *See, e.g., State v. Ratcliff*, 416 So. 2d 528 (La. 1982). Moreover, this court on several occasions in death penalty cases, when the issue is sufficiently troubling, has not deferred the issue to post-conviction proceedings, but has conditionally affirmed the conviction and sentence, and remanded the case to the district court for a hearing on the issue of ineffective assistance. *See, e.g.. State v. Wille*, 559 So. 2d 1321 (La. 1990).

In the present case, this court, after considering each of defendant's contentions regarding ineffective assistance of trial counsel, concludes that defendant failed to establish a sufficient basis to deviate from the normal practice of relegating such issues to post-conviction proceedings.

Incomplete Record

Defendant contends that the trial court's failure to have each bench conference and ruling properly transcribed denied him the right to full appellate review of his conviction and sentence.

Defendant complains primarily about bench conferences which took place during the cross-examination of Eddie Paul, the cousin of co-perpetrator West Paul, who alerted the authorities about defendant's involvement in the murder. The first omission occurred when defense counsel suggested that the witness may have been previously incarcerated on charges other than those dealing with his failure to pay child support. After the untranscribed bench conference, defense counsel abandoned the issue.

The second untranscribed bench conference during Paul's testimony occurred when the prosecutor objected to defense counsel's reading into the record a statement that Paul had given to the police. The prosecutor requested that she be allowed to review, before the statement was read to the jury, any allegedly prior inconsistent statement that was to be used to impeach the witness. The court then held an off-the-record discussion with the attorneys and ordered a recess.

The third unrecorded bench conference took place during cross-examination of Paul after defense counsel asked him if he remembered telling the police that nobody planned the crime at his residence. Paul responded, "I couldn't have told him that," and defense counsel began to read from his recorded statement. The prosecutor objected, claiming the portion of the transcript which defense counsel was reading was not responsive and thus did not impeach Paul's testimony. After the conference, defense counsel did not pursue the alleged discrepancy between Paul's statement to the police about the planning of the robbery and his trial testimony.

The fourth unrecorded conference took place after defense counsel asked Paul if the police threatened to whip him when they arrested him in connection with the offense. Again the prosecutor requested a bench conference, and defense counsel did not pursue the issue after the sidebar.

The final two unrecorded bench conferences during Paul's testimony occurred when the prosecutor objected to defense counsel's questions about events following Paul's arrest, claiming they were irrelevant and lacked impeachment value.

This court has ordered a new trial when *material* portions of the trial record were unavailable or incomplete; however, a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal" does not require reversal of a conviction. *State v. Parker*, 361 So. 2d 226 (La. 1978); *State v. Ford*, 338 So. 2d 107, 110 (La. 1976).

In this case, the bench conferences primarily concerned the relevancy of defense counsel's questions which did little to impeach Paul's testimony. Because defendant failed to show that he was prevented from presenting any relevant evidence, he has not established that prejudice resulted from the absence in the record of the substance of the conferences.

Defendant also complains about an unrecorded bench conference which took place during his examination of an employee of the Louisiana State Police Crime Lab.

The sidebar conference occurred after defense counsel asked the witness if he had an opinion about whether any .25–caliber bullets struck either of the victims. The prosecutor objected, arguing that the expert was not qualified to respond to the question, and the court sustained the objection after an unrecorded bench conference. Later, after defense counsel rephrased the question, the expert responded.

Finally, defendant complains about an unrecorded bench conference which took place after the prosecutor objected to the witness' reading from a list of exhibits in order to testify which pieces he had examined. After the sidebar conference, the witness stated that several items seized by the police had turned out to be irrelevant to the investigation.

In both instances, the witness ultimately answered defense counsel's questions. Consequently, defendant has failed to demonstrate that any prejudice resulted.

Capital Sentence Review

Under La. Code Crim. Proc. art. 905.9 and La. S. Ct. R. 28, this court reviews every sentence of death to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under the influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

Defendant was twenty years old on the date of the crime, and his IQ was seventy-five. He had a lengthy criminal record, including an arrest as a juvenile for first degree murder and distribution of cocaine in 1989. The police report of that incident indicated that defendant and a friend, under instructions by a drug dealer whose customer could not pay, shot at a car being driven by the customer, who later died from the gunshot wounds. Charges against defendant and his accomplice, also a juvenile, were dropped in exchange for their testimony against the seller of the narcotics.

As an adult, defendant was convicted of the armed robbery in Clinton, discussed above. Defendant also had adult convictions for felony theft, attempted possession of cocaine, and simple battery of a police officer.

1. *Passion, Prejudice, or Other Arbitrary Factors*

Defendant, the victim and the jury foreman were all African–Americans. Nothing in the record suggests race was an issue in the trial.

Defendant's case received extensive news media coverage. However, as discussed in the appendix about defendant's change of venue argument, more than one hundred prospective jurors were questioned during fourteen days of voir dire, and the court excused less than twenty because of their inability to render a verdict based on the evidence presented at trial. Moreover, defendant's trial took place two and one-half years after the offense occurred.

2. *Aggravating Circumstances*

The prosecutor presented more than sufficient evidence to demonstrate the aggravating circumstances that defendant was engaged in the perpetration of an attempted armed robbery and that defendant knowingly created a risk of death or great bodily harm to more than one person. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). Even if there was merit in defendant's contention that the jury erred when it found sufficient evidence that defendant intended to kill a peace officer engaged in her lawful duties,[6] the jury's sentencing determination would not be vacated because there was sufficient evidence to support at least one other aggravating circumstance and the evidence relating to the arguably unsupported aggravating circumstance did not interject an arbitrary factor into the proceedings. *State v. Sawyer*, 422 So. 2d 95 (La. 1982);

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[6] That contention is rejected in the appendix. *See* La. Rev. Stat. 14:30 B; La. Rev. Stat. 40:2402; *State v. Berry*, 391 So. 2d at 406 (La. 1980).

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983).

3. *Proportionality*

The federal Constitution does not require a proportionality review. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L.Ed.2d 29 (1984). However, comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Thompson*, 516 So. 2d 349 (La. 1987). Nevertheless, this court has set aside only one death penalty as disproportionately excessive under the post–1976 statutes, concluding that there was a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So. 2d 1, 9 (La. 1979).

Jurors in the 19th Judicial District Court have recommended imposition of the death penalty in approximately thirteen cases. In the case of Henri Broadway, the other shooter involved in the crime, the jury also returned a death verdict.

Several other cases in which the death penalty was imposed involved facts similar to this case. *See State v. Williams*, 96–1023 (La. 1/21/98), 708 So. 2d 703 (an eighteen-year-old defendant murdered the victim while attempting to rob him in his truck; earlier that day, the defendant had shot and wounded another victim during the attempted perpetration of an armed robbery); *State v. Craig*, 95–2499 (La. 5/20/97), 699 So. 2d 865, *cert. denied*, 522 U.S. 935, 118 S. Ct. 343, 139 L.Ed.2d 266 (1997) (the seventeen-year-old defendant kidnaped the victim while stealing his truck, drove him to a secluded area, and shot him three times in the head); *State v.*

Scales, 93–2003 (La. 5/22/95), 655 So. 2d 1326, *cert. denied*, 516 U.S. 1050, 116 S. Ct. 716, 133 L.Ed.2d 670 (1996) (the nineteen-year-old defendant, while engaged in the armed robbery of a fast-food restaurant, shot and killed one of the employees); *State v. Taylor*, 93–2201 (La. 2/28/96), 669 So. 2d 364, *cert. denied*, 519 U.S. 860, 117 S. Ct. 162, 136 L.Ed.2d 106 (1996) (during the armed robbery of a fast-food restaurant where defendant had previously been a employee, he shot and killed one employee, and shot and permanently paralyzed another); *State v. Williams*, 383 So. 2d 369 (La. 1980) (defendant shot and killed the victim during an armed robbery of a grocery store).

Decree

For the reasons assigned, defendant's conviction and sentence are affirmed for all purposes, except that this judgment shall not serve as a condition precedent to execution, as provided by La. Rev. Stat. 15:567, until either (a) defendant fails to petition the United States Supreme Court timely for certiorari; or (b) that Court denies his petition for certiorari and either (i) defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari, or (ii) that Court denies his petition for rehearing.

APPENDIX
PRE–TRIAL AND VOIR DIRE ISSUES

Challenges for Cause

Defendant claims that the trial court erred when it denied his cause challenges to jurors Wayne Bahr,

Dayle Smith and Monica Salvaggio, Bahr and Smith because of their predisposition to vote in favor of the death penalty and Salvaggio because of her belief in defendant's guilt. The prosecutor notes, and a review of the record confirms, that Salvaggio was struck for cause. Accordingly, we need not consider any argument concerning her.

When questioned on direct, Bahr indicated that he could return either a death sentence or one of life imprisonment, depending on the particular facts of the case and the aggravating and mitigating evidence. When asked by defense counsel whether he could consider youth as a mitigating factor, Bahr said that if defendant was "real young, you know, that might come into play. But I don't know how much it would come into play. Right now I am saying I don't know if it would [come into play] a whole lot just because he was younger when he did it."

Defense counsel then asked if Bahr would "automatically" vote to impose the death penalty absent mitigating circumstances. The prosecutor objected on grounds that the question presupposed a set of facts, and the court sustained the objection. After the court sustained three more prosecution objections to essentially the same question, defense counsel asked, "Given a first degree murder, do you feel that the only appropriate sentence is death?" Bahr explained, "If [defendant] is convicted of first degree murder and the aggravated situations are proven and one of the mitigations [sic] is not proven to me then, yes, I would believe in death because that is per law."

The defense challenged Bahr for cause, claiming his responses indicated a predisposition to impose the death. The prosecutor responded:

> Your honor, when I questioned this man, and I was the first one to do it concerning his attitude on the death penalty, he came into this courtroom and said that he did a lot of thinking about it. Particularly in view of the fact that he was being called into this scenario. I think very candidly said that it would require a lot of soul searching before he could even return the death penalty in this case. As to each of the questions they were trying to get the man into the trick bag. I objected. The court sustained that objection three times. He stated that he would not do it automatically. He would have to listen to the aggravating and mitigating evidence at trial. That is what I got from him very clearly.

Defense counsel acknowledged that this statement correctly characterized Bahr's testimony, but nonetheless maintained that his statement that he would return a death verdict if defendant did not present mitigating evidence revealed a predisposition toward a death verdict. The court disagreed, stating it did not indicate a predisposition, and denied the challenge for cause.

Juror Dayle Smith indicated in his pre-trial questionnaire that he found attorneys to be basically dishonest. He also indicated he had "problems" with the judicial system because of "cases where ... the lawyer knows their client is guilty and ... say that in court, that lawyer gets disbarred." Despite these views on the

adversarial system, Smith responded, when asked if he could act as a fair juror to defendant, that he did not believe his views "would affect anything." However, the defense questioned Smith further on the topic, asking him, "can you assure us you would be a fair and impartial juror and what you know and your feelings would not affect your deliberations in this case?" Smith responded, "No, not 100 per cent [sic]." The prosecutor objected, arguing that the juror's opinion was one of the judicial system and not of the facts of the case. The court sustained the objection, and Smith then maintained that he could be a fair and impartial juror.

When questioned on direct about his views of capital punishment, Smith stated:

> My view is that it has its purpose. I feel sometimes it's not applied correctly. For instance, someone will kill one person and get it and another person kills five and might get paroled in seven years. I think it's applied a little unevenly, but that's the only thing I have against it.

Smith also maintained that he thought death the appropriate penalty in certain cases. When informed by the defense that the case involved the killing of a police officer, Smith responded that because of that aggravating factor, "I would probably lean toward the death penalty, but if enough mitigating evidence was presented, I would consider [life imprisonment]." He also stated that defendant's youth at the time of the crime "by itself" would not cause him to change his verdict. Defense counsel pursued the issue, asking Smith, "If the court instructs you to consider it in—by

itself as a mitigating circumstance in deciding to impose the death penalty or life imprisonment, you really couldn't do that, could you?" Smith responded, "I would consider it, but I would tell you right now personally that by itself, it would not be enough unless there is something else presented." Defense counsel then asked Smith, "what ... if I gave you information about ... the capacity of the offender to appreciate the criminality of his conduct or to conform that conduct to a requirement of law was impaired as a result of intoxication ... Could you consider that?" Smith said, "No". When pressed, Smith stated, "That's ... one of my beliefs. I am like a lot of other college or post-college students. I go out and drink heavily sometimes, but one of my beliefs is no matter how much you drink, you're still responsible for your actions." Smith later clarified, "It would depend on whether that mental disease or defect impaired his ability to know right from wrong. You can have mental disease and still know right from wrong."

The defense challenged Smith for cause, claiming he indicated he would not consider either intoxication or youth as mitigating factors. The prosecutor requested that Smith be given the definition of intoxication in La. Code Crim. Proc. art. 905.5. When the defense interjected that Smith also stated he would not consider defendant's youth, the court corrected him, stating, "He said he could consider youth but it wouldn't mean that much by itself. Those are the words out of his mouth." The court then read Smith the definition of intoxication in the statute and asked him if he consider that as a mitigating circumstance, and he

responded affirmatively. The court then denied defendant's challenge for cause.

A trial court is vested with broad discretion in ruling on challenges for cause, and its rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross*, 93–1189, pp. 6–7 (La. 6/30/95); 658 So. 2d 683, 686–687; *State v. Robertson*, 92–2660 (La. 1/24/94); 630 So. 2d 1278, 1281. When a prospective juror has voiced an opinion seemingly prejudicial to the defense, a trial judge's refusal to excuse the juror is not an abuse of discretion if, on further inquiry or instruction, the juror has demonstrated a willingness and ability to decide the case impartially according to the law and evidence. *Robertson*, 630 So. 2d at 1281.

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L.Ed.2d 841 (1985); La. Code Crim. Proc. art. 798(2)(a)(b). The "substantial impairment" standard also applies to the reverse-*Witherspoon* challenges. *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992). If a prospective juror's inclination toward the death penalty would substantially impair the performance of the juror's duties, a challenge for cause is warranted. *State v. Ross*, 623 So. 2d 643, 644 (La. 1993).

A juror who professed that she could "consider" a death sentence, but would begin from the premise that

life is the appropriate sentence based on particular mitigating circumstances applicable to the case (e.g. the youth of defendant), has been properly excluded from the sentencing phase. *State v. Williams*, 96–1023, pp. 9–10 (La. 1/21/98); 708 So. 2d 703, 713. A juror who states that he will return a death sentence solely on the basis of the verdict rendered at the guilt stage, unless the defendant produces clear and convincing mitigating evidence that he should not die, is properly excluded because Louisiana, by deliberate choice, does not provide any fixed standard for considering and giving effect to mitigating evidence. *State v. Strickland*, 94–0025, pp. 48–49 (La. 11/1/96); 683 So. 2d 218, 238 ("[T]his Court has determined that the lack of a standard actually gives defendants an advantage by allowing jurors to consider any amount of mitigating evidence in their determination.").

In the instant case, the court did not abuse its discretion when it denied the challenges for cause. Bahr's responses did not indicate that he would refuse to consider the defendant's youth as a mitigating circumstance, but indicated only, and appropriately, he could not say how much weight he would attach to that single circumstance before hearing all of the evidence in the case. His responses reflected his disposition toward imposing the death penalty in cases in which the prosecutor proves the existence of aggravating circumstances and the defense fails to offer evidence in mitigation. Although jurors are not required to return a death penalty under any combination of circumstances, including an overwhelming imbalance of aggravating and mitigating factors, Bahr was responding to a

hypothetical question which did not fit this case. How Bahr would respond in a hypothetical situation in which the defense presented no mitigating evidence did not disqualify him as a juror in a case in which the defense presented several mitigating factors.

Similarly, although Smith indicated that defendant's youth alone would not cause him to vote for life imprisonment, he did state that he could consider youth when deciding what verdict to return.

A review of the voir dire record as a whole reveals that the trial court did not abuse its discretion when it denied the cause challenges.

Use of Peremptory Challenges Before a Full Panel of Jurors Was Impaneled

Defendant claims that the trial court erred in requiring the defense to simultaneously exercise its last three peremptory challenges after both sides provisionally accepted individual jurors under La. Code Crim. Proc. art. 788, but before the court swore the jury panel as a whole under La. Code Crim. Proc. art. 790. *See* La. Code Crim. Proc. art. 795B(1).

Defense counsel had exercised nine of his twelve peremptory challenges before the court provisionally seated the twelfth juror. Defense counsel then sought to exercise his remaining peremptory challenges on jurors who had been previously sequestered. The prosecutor did not object to this request to exercise back strikes. However, the prosecutor argued that defendant should be required to use all of his remaining peremptory challenges in one stroke, rather than exercising one and then assessing the next voir dire

panel before exercising each subsequent challenge. After a recess, the court allowed defendant to exercise his remaining peremptory challenges simultaneously.

Both prosecutor and defendant may exercise remaining peremptory challenges against individually sworn jurors before the swearing of the full jury panel under La. Code Crim. Proc. arts. 790, 795. *State v. Watts*, 579 So. 2d 931 (La. 1991).

In the instant case, defendant was not denied his remaining peremptory challenges, and we cannot say that the trial judge abused his discretion in conducting the voir dire as he did. In any event, this matter is subject to harmless error analysis. *State v. Taylor*, 93–3301, p. 24 (La. 2/28/96); 669 So. 2d 364, 377, *cert. denied*, 519 U.S. 860, 117 S. Ct. 162, 136 L.Ed.2d 106 (1996). In *Taylor*, the trial court denied the defendant's request to exercise his remaining four peremptory challenges at the conclusion of jury selection. *Id.* Despite the violation of the *Watts* rule, no reversible error occurred because the voir dire did not violate the constitutional "right to full voir dire examination of prospective jurors...." La. Const. art. I § 17; *Taylor*, 669 So. 2d at 378.

In the instant case, jury selection had begun twelve days earlier, and 134 jurors were questioned during voir dire. *Cf. Taylor*, 669 So. 2d at 378 (seventy potential jurors examined over eleven days). In this situation, defendant fails to show prejudice, especially since he was not deprived of any peremptory challenges.

Denial of Resources Necessary to Present a Defense

Defendant contends that he was denied, in both phases of the trial, the resources necessary to present his defense.

1. *Denial of Audio Expert*

Defendant claims that the court erred when it did not provide him with funds to send a videotape of his confession to experts who could have examined it to determine whether the cocking of pistols could be heard while he gave his statement. Defendant unsuccessfully sought review of the court's pre-trial ruling in the court of appeal and in this court. *State v. Brumfield*, 93–0805 (La. App. 1st Cir. 1993), *cert. denied*, 94–0279 (La. 3/25/94); 635 So. 2d 245. The denial of a pre-trial application for supervisory writs does not bar consideration on direct appeal. *State v. Fontenot*, 550 So. 2d 179 (La. 1989).

Defendant sent the expert $300 to do a preliminary examination of the tape, and the trial court denied additional funds until defendant produced the findings of the expert's initial evaluation. Ultimately, the court did not provide further funds for the expert. Appellate counsel claims that additional prejudice resulted from the court's ruling when the prosecutor referred to the lack of evidence—including expert testimony—corroborating defendant's claim that police coerced his confession by cocking their weapons.

This court has held that:

> [F]or an indigent defendant to be granted the services of an expert at the expense of the state,

> he must establish that there exists a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial. To meet this standard, a defendant must ordinarily establish, with a reasonable degree of specificity, that the assistance is required to answer a substantial issue or question that is raised by the prosecution's case or to support a critical element of the defense.

State v. Touchet, 93–2839, p. 16 (La. 9/6/94); 642 So. 2d 1213, 1216.

As the court of appeal noted, the interrogation was conducted in a busy environment which allowed the unobstructed transmission of sounds from other areas. At the suppression hearing, an officer described the interrogation room, "There's a door, you know, partitions, walls. There's no ceiling so consequently you can hear a lot of things.... There was business going on. There were telephones ringing. There were secretaries typing. Other detectives were there."

In this situation, the defense never established "with a reasonable degree of specificity" that a videotape expert was required to answer a substantial issue or question "to support a critical element of the defense." Moreover, defendant fails to demonstrate the existence of prejudice resulting from the trial court's denial of funds. *See Caldwell v. Mississippi*, 472 U.S. 320, 325 n.1, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985) (refusing to require state to fund ballistics expert when defendant "offered little more than undeveloped

assertions that the requested assistance would be beneficial").

Finally, defendant failed to object to the prosecutor's closing argument that exploited the absence of expert testimony corroborating defendant's claim about the cocking of weapons during his confession. Any claim of error based on prosecutorial misconduct was therefore waived. La. Code Crim. Proc. art. 841; *State v. Taylor*, 93–2201, p. 7 (La. 2/28/96); 669 So. 2d 364, 369 (contemporaneous objection rule applies to errors committed at guilt stage of a capital case), *cert. denied*, 519 U.S. 860, 117 S. Ct. 162, 136 L.Ed.2d 106(1996).

2. *Denial of Expert on Prison Life*

Defendant also claims that the court erred when it did not provide funds for a prison life expert. During its initial ruling, the trial court indicated that evidence provided by a prison-life expert would be inadmissible. The court of appeal granted supervisory writs on the issue and ordered the trial court to reconsider its ruling in light of *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986), which held that evidence on a defendant's adjustment and good behavior while in prison is within the defendant's right to present all relevant evidence in mitigation. *State v. Brumfield*, 93–0805 (La. App. 1st Cir. 1993). Nonetheless, the trial court did not provide defendant funds for such an expert.

Notwithstanding the Supreme Court's dictate in *Skipper*, defendant fails to show that the trial court erred in refusing to provide funding for a prison life

expert. In fact, when questioned about defendant's prospective adaptation to prison life, social worker Dr. Cecile Guin informed the jury that "in a large group, if it's lots of people, lots of chaos, [defendant] doesn't do well. But if you leave him alone, put him in a, you know, a structure with a controlled environment, then he does much better." Moreover, as discussed below in the section on the exclusion of alleged mitigation evidence, Dr. Guin also testified about defendant's disciplinary record while incarcerated. Under these circumstances, defendant fails to show "a reasonable probability both that an expert would be of assistance to the defense and that the denial of expert assistance [resulted] in a fundamentally unfair trial." *Touchet*, 642 So. 2d at 1216.

3. *Unreasonable Interference in Funding Decisions*

Defendant argues that the trial court interfered with his right to present mitigating evidence by becoming overly involved in funding decisions. Specifically, he claims that the trial judge, "apparently working to be certain that the fiscal impact was necessary, erroneously took up whether the particular need [for an expert] made sense." However, as we have noted above, the court, in making decisions about public funding for experts for indigent defenders, must determine whether there is a "reasonable probability" that the expert's evidence will materially assist the defense with respect to a substantial issue of the case. *See State v. Touchet*, 93–2839, pp. 4–6 (La. 9/6/94); 642 So. 2d 1213, 1216. Accordingly, the trial court must obtain some knowledge of defendant's case in order to make reasonable funding decisions. Moreover, the hearings of defendant's motions for funds were held ex

parte; thus, he does not show that any prejudice resulted from the court's knowledge of his case.

Change of Venue

Defendant claims that the trial court erred when it denied his motion for a change of venue based on extensive publicity about the case. Defendant offered into evidence videotapes and news reports about the case. In addition, defendant called the Chief of Police of Baton Rouge at the time of the crime. The Chief testified that this was the first murder of a police officer since he became chief, and that the reaction was widespread and sympathetic to the victim, though the Chief said he had "nothing against which to compare it."

In denying defendant's motion for a change of venue, the court stated:

> Well, over the course of the last fourteen days we've interviewed approximately one hundred eighty to a hundred and ninety ... jurors. I attempted to keep some track of the challenges for cause, and while my count is not by any means definitive, I counted somewhere less than twenty of those jurors being excused for reasons of their not only knowledge of the pre-trial publicity, but inability to set aside what they heard about the case and decide [ ] strictly on the basis of evidence in this courtroom, and that is the test. The test is not that the juror has not heard anything about anything, the question is whether the juror can set aside what he or she has heard in the press, not form any opinions,

> judge the case strictly upon the evidence that's introduced in the course of the trial. Somewhere less than twenty people out of that hundred eighty or hundred ninety said they couldn't do that. You exercise peremptory challenges for whatever reason, but there was not a single [one] that said that they couldn't do that who was not stricken for cause. So the court feels that—there is no grounds for the motion for change of venue ... And I have to also take into account the fact that this is some two and a half years past the point that that publicity was broadcast. For all those reasons, your motion for a change of venue will be denied.

A defendant is guaranteed an impartial jury and a fair trial. La. Const. art. I, § 16. Accordingly, the law provides for a change of venue when a defendant establishes that he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *State v. Bell*, 315 So. 2d 307, 309 (La. 1975); *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L.Ed.2d 663 (1963). In unusual circumstances, prejudice against the defendant may be presumed. *State v. David*, 425 So. 2d 1241, 1246 (La. 1983). Otherwise, the defendant bears the burden of showing actual prejudice. *State v. Vaccaro*, 411 So. 2d 415 (La. 1982). Whether the defendant has made the requisite showing of actual prejudice is "a question addressed to the trial court's sound discretion which will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion." *State v. Wilson*, 467 So. 2d 503, 512 (La. 1985).

"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind ... a fair and impartial trial cannot be obtained in the parish where the prosecution is pending." La. Code Crim. Proc. art 622. Several factors are pertinent in determining whether actual prejudice exists, including (1) the nature of pretrial publicity and the degree to which it has circulated in the community; (2) the connection of government officials with the release of the publicity; (3) the length of time between the publicity and the trial; (4) the severity and notoriety of the offense;(5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. *State v. Brown*, 496 So. 2d 261, 263 (La. 1986). "The length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality." *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L.Ed.2d 589 (1975). Because a defendant is not entitled to a jury that is entirely ignorant of his case, he cannot meet his burden by merely showing a general level of public awareness of the case. *State v. Thompson*, 516 So. 2d 349, 352 (La. 1987); *Brown*, 496 So. 2d at 263.

This court and the Supreme Court have often considered the number of jurors excused for having a fixed opinion as a gauge of whether prejudice exists in the public mind. This case is in line with cases where

the courts have not required a change of venue. *See, e.g., Murphy*, 421 U.S. at 803, 95 S. Ct. 2031 (holding that excusing twenty of seventy-eight venire persons because of opinion of defendant's guilt did not justify venue change); *State v. Connolly*, 96–1680, p. 5, (La. 7/1/97), 700 So. 2d 810, 815 (no need for venue change where 120 of 139 potential jurors possessed some knowledge about the crime, but most had only a vague recollection of the surrounding facts); *State v. Wilson*, 467 So. 2d 503, 513 (La. 1985) (no grounds for venue change where only four of thirty-nine jurors were excused for having a fixed opinion). In the present circumstances, defendant's claim about a change of venue does not present reversible error.

Curtailment of Voir Dire

Defendant claims that the court improperly restricted his questioning during voir dire.

First, he complains that the court did not allow him to question juror Terry Teekell concerning his ability to judge defendant's guilt on the evidence presented at trial. Defendant asked Teekell if he could ignore news reports he had seen which led him to believe that "these people are guilty." Teekell ultimately answered that exposure to the news reports would not influence his decision. The defense then asked "how" Teekell would be able to set those things aside. The prosecutor objected, and the court sustained the objection. Defendant later challenged the juror for cause, and the court denied the challenge.

Defendant also complains about an instance when the court required his counsel to change topics while

questioning prospective juror Mary Binning. The court had determined that defense counsel had already asked about Binning's alleged predisposition to return a death verdict and concluded that defense counsel was confusing her. Defense counsel first asked Binning if she would "automatically" vote for the death penalty if defendant were found guilty of first degree murder. When Binning answered affirmatively, defense counsel asked if she would still return a death verdict "regardless of information ... offer[ed] in mitigation," and she answered, "No." When defense counsel sought to clarify a perceived contradiction in her responses, Binning said she was confused by the question. The court then rephrased the question, explaining:

> The law requires that you as a juror before the death penalty can be returned you have to be convinced of the existence of an aggravating, at least one aggravating circumstance, and you are required to consider all of the mitigating circumstances, you then reach your determination as to what the appropriate sentence will be in this case. Can you do that ma'am?

Binning said, "Yes." Defense counsel nonetheless continued to pursue the issue, so the court called counsel to the bench and said:

> All right. That's the third time you've asked that to that juror. You asked it to the other juror four times. It's a confusing question. The lady was confused the first time. I let you ask her three separate times before I stepped in and stated it the way the law provides. She has answered that

question. Move on to something else. I'll note your objection.

Defense counsel later challenged Ms. Binning for cause, and the court denied the challenge, noting that when asked about a death verdict "in a manner in which the law states it, and in a non-misleading manner, she responded properly."

Defendant also complains about the sustaining of the prosecutor's objection to questions to prospective juror Bahr (discussed above in the context of cause challenges.) The defense asked if Bahr would "automatically" vote to impose the death penalty absent mitigating circumstances, and the prosecutor objected on grounds that the question presupposed a set of facts. The court sustained four prosecution objections to essentially the same question and ultimately denied defense counsel's cause challenge of Bahr.

La. Const. art. I, § 17 guarantees a defendant full voir dire examination of prospective jurors and the right to challenge jurors peremptorily. The purpose of voir dire is to determine qualifications of prospective jurors by testing their competency and impartiality in order to discover bases for challenges for cause and for the intelligent exercise of peremptory challenges. *State v. Hall*, 616 So. 2d 664, 668 (La. 1993). The scope of examination rests within the sound discretion of the court, and its ruling will not be disturbed absent clear abuse. La. Code Crim. Proc. art. 786; *Hall*, 616 So. 2d at 669. In determining whether the trial court afforded a sufficiently wide latitude to the defendant, the court

must consider the entire voir dire examination. La. Code Crim. Proc. art. 786; *Hall*, 616 So. 2d at 669.

Here, the trial court did not prevent defense counsel from ascertaining prospective jurors' qualifications nor cause him to exercise peremptory challenges haphazardly. Teekell indicated that he would not let the media coverage influence his verdict. Binning, when asked in an unambiguous fashion, said she could consider both a verdict of death and life imprisonment and consider both aggravating and mitigating circumstances. Likewise, Bahr demonstrated that he could consider verdicts of both death and life imprisonment. In these circumstances, defendant fails to show that the court abused its discretion when it curtailed the voir dire questioning in certain instances in order to clarify issues for the prospective jurors. La. Code Crim. Proc. art. 786; *Hall*, 616 So. 2d at 669.

Discovery Violation

Defendant claims that the court erred when it did not order the prosecutor to turn over statements made by Eddie Paul, who was allegedly described as one of the perpetrators in an affidavit of probable cause. In response to the motion to produce the statement, the prosecutor contended that Eddie Paul's involvement in the crime was that of a material witness, rather than a principal, and thus that defendant was not entitled to his statements. The record contains no transcription of

the court's discovery ruling,[1] although there is a copy of the court of appeal's denial of defendant's application for supervisory writs. *State v. Brumfield*, 93–1527 (La. App. 1st Cir.8/23/93) (noting in dicta that Eddie Paul was not a codefendant).

La. Code Crim. Proc. art. 722 provides in part that the prosecutor must make available "any relevant written or recorded confessions or inculpatory statements made by a codefendant...." When deciding whether a defendant is entitled to a witness's statements, the court should focus on the question of when co-participants in a crime become "co-defendants" for purposes of Article 722. See *State v. Kimble*, 375 So. 2d 924 (La. 1979) (uncharged co-participant not a codefendant for purposes of Article 722); *State v. Fleming*, 574 So. 2d 486 (La. App. 4th Cir. 1991), *cert. denied*, 592 So. 2d 1313 (La. 1992) (murder defendants not entitled to statements made by witnesses during pretrial discussions because witnesses were not indicted for first-degree murder and thus were not codefendants).

According to a detective's trial testimony, Eddie Paul was originally arrested for the crime, but was soon released. The detective further testified that Eddie Paul remained in police custody voluntarily before defendant's arrest for his own protection. In any event, defendant concedes in his brief he is not entitled to pre-

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[1] Neither defense counsel nor the prosecutor cites to a hearing on the discovery. The minutes indicate that the court ruled the prosecutor's answers sufficient on March 29, 1993.

trial statements made by Eddie Paul, stating "the *Kimble* rule is subject to abuse by prosecutors who may simply chose [sic] not to indict a co-conspirator witness in the principal crime in order to protect prior statements from discovery. This is a bad policy which the Court should change." *See Kimble*, 375 So. 2d at 929–30.

Given his concession as to the state of the law, defendant does not show entitlement to Eddie Paul's statements. Further, defendant fails to show prejudice resulting from the prosecutor's failure to provide the statements. See *State v. Bourque*, 92–0968 (La. 7/1/93); 622 So. 2d 198, 239 (before being entitled to relief, defendant must show prejudice resulting from the prosecutor's failure to comply with discovery procedure); *State v. Schrader*, 518 So. 2d 1024, 1031–32 (La. 1988).[2]

Motion to Suppress

Defendant claims that the trial court erred in sustaining the prosecutor's objection when he tried to impeach the credibility of the police at the suppression hearing. He also claims that the court erred when it ruled his confession admissible.

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[2] The prosecutor provided defense counsel with at least one of Eddie Paul's statements, as shown by the cross-examination of the witness during which defense counsel read into the record a statement that Paul had given to the police.

1. *Curtailed Impeachment*

A Baton Rouge police sergeant testified on direct examination by the prosecutor that he monitored the interrogation of defendant, that he observed no one threaten, coerce or physically intimidate defendant, and that the interrogating officers did not display their weapons, apply any physical pressure to defendant or use any plastic or paper bags as a means of forcing defendant to answer questions.

On cross-examination, defense counsel asked the sergeant about alleged improprieties which took place some years earlier when officers interrogated suspects during the investigation of the murder of a police officer. The prosecutor objected, claiming that any alleged improprieties in an unrelated investigation years earlier were not relevant to defendant's present claim. The court sustained the objection, stating, "What was done in prior cases is not relevant to what was done in this case."

The prior record of misconduct by one police officer has no relevance when the defendant alleges mistreatment by another officer. *State v. Floyd*, 435 So. 2d 992, 995 (La. 1983). Here, defendant provides no suggestion that any of the officers who participated in his arrest and interrogation had previously engaged in any acts of misconduct. Thus he fails to demonstrate that the court erred when it did not allow the defense to pursue that line of questioning which would have possessed little relevance to defendant's claims of abuse.

2. *Defendant's Confessions*

Defendant argues that the court should have suppressed his two videotaped confessions that allegedly were coerced.

The police arrested defendant pursuant to a warrant on January 11, 1993. When the police approached him, defendant discarded a loaded handgun and called to an officer that he knew, "Don't let them kill me, Browning." Defendant was handcuffed, advised of his *Miranda* rights, and taken to the narcotics office for questioning.

When first questioned at the narcotics office, defendant denied any knowledge of the murder. A detective then asked defendant, hypothetically, his theory of the crime. Defendant responded that it was a deal that "went bad." Defendant speculated that the perpetrators had used .25, .32 and .380 caliber weapons. When asked the best way to commit the crime, defendant responded, "hide, wait, have their guns out ready." The detective testified that defendant's "theory" of the crime matched details which had not been released to the public.

Based on these responses, the detective asked defendant if he had been personally involved in the crime. Defendant claimed that he was at his brother's place of employment at four different times the night of the crime. Officers then spoke with defendant's brother, who disagreed with defendant's alibi. The officers confronted defendant with his brother's

account, and defendant admitted personal involvement in the crime.[3]

Defendant next tried to minimize his involvement in the crime, claiming he had parked the car down the street while his two accomplices committed the robbery and murder. Defendant agreed to give a videotaped statement about the crime, and a detective again read him the *Miranda* warnings. The videotaped interview began at 12:58 a.m. and concluded at 1:48 a.m. During the statement, defendant maintained that he accompanied Henri Broadway and West Paul to do a "hustle," which he explained normally meant committing a robbery. He claimed he had no knowledge that the two intended to rob the victims on their way to the bank with the night deposit. Defendant also stated that he went to the victim's funeral because he felt remorse for the crime.

After defendant gave his first videotaped statement, he identified Broadway from a mug shot. Police arrested Broadway and West Paul, and took them into custody. Both men asserted that defendant was the one who shot the victim. Officers took all three codefendants to another police station. Between 10:30 a.m. and 11:00 a.m., police advised defendant that both West Paul and Broadway implicated him as the shooter. Further, the layout of the interrogation rooms permitted defendant, and his girlfriend who then

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[3] Defendant's admission of involvement in the offense occurred about 11:30 p.m., about five hours after the beginning of the interrogation.

accompanied him, to overhear West Paul assert in his statement that defendant was the shooter. According to the detective, defendant became emotional—striking the walls and abusing a chair—when he found out that Broadway and West Paul identified him as the shooter and when his girlfriend learned that he had been accused of shooting the victim.

Defendant then admitted that he indeed shot the victim and agreed to make another videotaped statement. A detective again advised defendant of his *Miranda* rights, and defendant gave his second videotaped confession. The detective testified that defendant appeared "mentally well and alert" when he gave the statement and that he did not request an attorney.

The second videotaped interview began at 2:18 p.m. on January 12, 1993 and concluded at 2:45 p.m. During this confession, defendant admitted ambushing the victims and stated he planned the robbery because he knew from "riding around" when the night deposit would be made. He claimed he and Broadway hid in the bushes surrounding the bank for about fifteen minutes before the marked police vehicle arrived. He also stated he saw that the deceased victim was in uniform when he fired at the vehicle.

Defendant claimed that interrogating officers first hit him in the stomach with a flashlight and slapped him in the face. Defendant stated that after the officers told him that his codefendants had confessed, "they started beating me, you know, grabbing me, throwing me against the wall, dragging me on the floor and stuff." He also asserted that an officer placed a gun in his

mouth before he gave the second statement. As to the first statement that he was merely the getaway driver, defendant testified that two officers stood behind the camera with flash cards, prompting defendant to make the incriminating statements. Defendant concluded by stating that he would not have given the statements if the officers had not beaten and threatened him.

At the suppression hearing, the chief indigent defender testified that he visited defendant in parish prison shortly after his arrest and that defendant showed him some fresh abrasions on his legs. On cross-examination, the attorney stated he did not find defendant's condition warranted medical attention and that he did not document the injuries.

Codefendant Henri Broadway claimed he overheard defendant screaming and hollering for his lawyer and requesting that his girlfriend contact an attorney for him. On cross-examination, Broadway claimed he heard the commotion occurring in defendant's interrogation room between 2:00 p.m. and 3:00 p.m. When informed by the prosecutor that defendant gave his second videotaped statement at 2:15 p.m., Broadway stated that his estimation of the time may have been incorrect because there was no clock in the room.

Defendant's girlfriend claimed she was present and heard defendant screaming to her from the interrogation room to call his attorney. Officers later let her see defendant, and he told her that he didn't do it and that the detectives made him confess. She stated that she was his girlfriend at the time of defendant's arrest, and had since given birth to their child. She also testified that she had broken up with defendant

between six months and a year before the suppression hearing.

On cross-examination, the girlfriend stated that she did not remember defendant's telling her that anyone had hit him with a flashlight, stuck a gun in his mouth, thrown him against a wall or dragged him across the floor. She also stated that defendant did not tell her that officers had struck him in the face.

The videotapes show no signs of coercion, inducements or threats. As to defendant's claim that the sound of a pistol cocking could be heard during this statement, there is considerable background noise on the tape. Defendant himself, when cross-examined, became very flustered and confused when questioned about who beat him before he gave his second videotaped statement

The prosecutor then asked defendant if he had also claimed that his confession regarding the armed robbery in Clinton had been coerced. Defendant stated that he made that claim because the interrogating officer in that case had squeezed the skin on his wrists with handcuffs. He also admitted that he previously told his attorney that the Clinton officer had threatened him with, a gun when interrogating him at parish prison. The prosecutor then asked defendant if he had later learned that guns were not allowed in the prison, and defendant maintained that the officer had a gun.

Numerous police officers testified about defendant's interrogation and confession. While there may have been some slight inconsistency as to whether a

particular officer wore his gun during part of the interrogation, all the witnesses consistently and specifically denied defendant's allegations. They asserted that no threats or force ever were applied to defendant and no weapons were brandished.

Both the prosecutor and the defense rested subject to the stipulation that the court would reopen the matter if the defense produced new and relevant witnesses. The parties then submitted the matter without argument. The court eventually denied the motion to suppress, "[b]ased on the testimony ... heard over these past months and particularly this last week, [and] the physical items introduced into evidence."

Before introducing a confession into evidence, the prosecutor must show affirmatively that the statement was free and voluntary, and not the result of fear, duress, intimidation, menace, threats, inducements or promises. La. Rev. Stat. 15:451; *State v. Simmons*, 443 So. 2d 512 (La. 1983). The prosecutor must expressly rebut a defendant's specific allegations of misconduct. *State v. Vessell*, 450 So. 2d 938, 942–43 (La. 1984). Credibility determinations lie within the sound discretion of the trial court, and the ruling should not be disturbed unless clearly contrary to the evidence. *Vessell*, 450 So. 2d at 943. In reviewing a trial court's judgment denying a motion to suppress, an appellate court is not limited to the evidence adduced at the hearing on that motion, but may consider all pertinent evidence given at trial. *State v. Green*, 94–0887, p. 11 (La. 5/22/95); 655 So. 2d 272, 280.

In the instant case, each officer present with defendant during the various interrogations testified

that no coercion had been employed when obtaining defendant's statements. Moreover, a review of the first videotaped confession, in which defendant claimed his answers were prompted by the use of flash cards, does not suggest that defendant was reading when he gave his responses to questions during the interrogation. Similarly, as to defendant's claims that a gun was pointed at him during the second videotaped interrogation and that the weapon was cocked at one point, a review of the tape reveals only that there was background noise during the interview. In any event, at no point can defendant be seen reacting to any alleged threats. Finally, defendant's testimony at the hearing contained numerous inconsistencies. Consequently, defendant fails to show that the trial court's determination is not entitled to deference, and there is no basis for overturning the denial of the motion to suppress.

TRIAL ISSUES

Sufficiency of Evidence That Victim Was a Peace Officer Engaged in the Performance of Her Lawful Duties

Defendant claims that the prosecutor presented insufficient evidence that the victim was a peace officer engaged in the performance of her "lawful duties," as required by the capital murder statute. The statute reads in part:

> A. First degree murder is the killing of a human being:
>
> ...

> (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties.

La. Rev. Stat. 14:30A(2). Defendant contends that because the evidence presented at trial demonstrated that the victim had in fact finished her shift on the force and was employed on paid security detail at the time of the crime, the prosecutor failed to prove the "lawful duties" element of the offense.

This court has addressed this argument once before. In *State v. Berry*, 391 So. 2d 406 (La. 1980), the defendant entered a bank to commit a robbery. He shot a uniformed police officer who was working a security detail. The victim was off duty when he died, but he had "just as other deputy sheriffs often do ... volunteered for this detail, drawing extra pay from the bank." *Id.* at 412. Although conceding that "[i]t might be said that [the victim] was "moonlighting," the court had little difficulty in finding that "[w]hatever the nature of the deputy's general activities at the bank in the context of the question whether he was engaged in his lawful duties—it was surely within the scope of his lawful duties as a deputy sheriff for him to try to prevent an armed robbery in his presence." *Id.*

This court decided *Berry* before the Legislature amended La. Rev. Stat. 14:30B in 1993 to adopt the following definition of a police officer, as found in La. Rev. Stat. 40:2402:

> "any full-time employee of the state, a municipality, a sheriff, or other public agency,

> whose permanent duties actually include the making of arrests, the performing of searches and seizures, or the execution of criminal warrants, *and is responsible for the prevention or detection of crime or for the enforcement of the penal, traffic, or highway laws of this state* ...." (emphasis added).

This definition underscores this court's holding in *Berry* that a police officer undertaking a security detail to protect the citizens of this state and to prevent or deter the commission of violent crime, whether paid from the public fisc or from private sources, is performing "lawful duties" for purposes of La. Rev. Stat. 14:30A(2). Accordingly, La. Rev. Stat. 14:30A(2) encompassed the victim in this case as she performed her lawful responsibilities by providing a security escort for a store manager on her way to the bank with the day's proceeds.

In any event, the failure of one statutory aggravating circumstance found by the jury to support a death sentence would not invalidate others, properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings. *State v. Byrne*, 483 So. 2d 564, 575 (La. 1986); *see also Zant v. Stephens*, 462 U.S. 862, 884, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983) (noting that under most circumstances "a death sentence supported by at least one valid aggravating circumstance need not be set aside ... simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."). In this case, the prosecutor proceeded with the first

degree murder charge based on three circumstances: (1) defendant intended to kill the victim during the perpetration of an attempted armed robbery; (2) the victim was a peace officer engaged in her lawful duties; and (3) defendant knowingly created a risk of death or great bodily to harm to more than one person. During the penalty phase, the jury unanimously found as aggravating circumstances all three elements. Accordingly, the jury's verdict at the sentencing stage would have survived any insufficiency of evidence that the victim was a peace officer engaged in the performance of her lawful duties. Finally, evidence of the victim's status did not inject any arbitrary factor into the penalty phase because that evidence was properly and inevitably admitted in the guilt phase. *State v. Byrne*, 483 So. 2d 564, 575 (La. 1986).

Reasonable Doubt Instruction

Defendant claims that the court gave an erroneous instruction on reasonable doubt to the jury at the close of the guilt phase of the trial.[4]

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[4] The relevant portion of the final charge reads:

> Now, while the state must prove guilt beyond a reasonable doubt, it does not have to prove guilt beyond all possible doubt. Reasonable doubt is doubt based on reason and common sense. And it's present when after you've carefully considered all of the evidence you cannot say that you are firmly convinced of the truth of the charge. As to reasonable doubt, it's not a mere slight misgiving or a possible doubt. You may say that it's self-defining. It's a doubt that a reasonable person could seriously entertain. It's a serious and sensible doubt. *It's a doubt that you could give a good reason for.* And while it's true that the

The same trial judge gave the same instruction in *State v. Williams*, 96–1023 (La. 1/21/98), p. 15, n.9; 708 So. 2d 703, 716, n.9. This court approved of the instruction, noting that while it did not follow the charge proposed in the Louisiana Judges' Criminal Bench Book, it did not equate substantial doubt with grave uncertainty as did the instruction in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990). *See Williams*, 708 So. 2d at 717. Moreover, the court in *Williams* noted that an instruction which equated reasonable doubt with "a serious doubt for which you could give good reason" passed constitutional muster. *Williams*, 708 So. 2d at 718 (citing *State v. Smith*, 91–0749 (La. 5/23/94); 637 So. 2d 398).

PENALTY PHASE ISSUES

Victim–Impact Evidence

Defendant claims that the prosecutor introduced impermissible victim-impact testimony during the penalty phase and made improper references about the victim during closing argument.

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state must prove the guilt of the accused beyond a reasonable doubt, this does not mean that the state has to prove the guilt of the accused to one hundred percent perfection, or to an absolute certainty. That's because the law recognizes that human nature being what it is, all human endeavors will fall short of perfection. Therefore, it is sufficient if after a full consideration of all the evidence, if [sic] you're honestly convinced from that evidence that the accused is guilty beyond a reasonable doubt. (emphasis added.)

During the penalty phase, the prosecutor asked the victim's son, "If you could say anything more to your mom, what would you want her to know?" The son responded, "I guess we're making it. There's not a day that goes by that we don't think about her. And of course, I want her to come and see me play [football] or just to be back here so I could talk to her."

During closing arguments, the prosecutor spoke of the victim's qualities when arguing that the jury should return a death verdict:

> [The victim] instilled in her children the fact that you don't have to commit crimes, you don't have to be criminals to live in society. She tried to put those good values, those just decent values, even though there were six children there and she was obviously struggling, working very hard, working at least two jobs all the time to make ends meet and she found time to go out and to coach those children, coach other people's children. She found time for other people. That was just the kind of person that [the victim] was and those values have obviously been instilled in her children. And when you kill that type of person who goes about every day working for us, that is truly a public servant, ladies and gentlemen, I submit to you that is one of the worst forms of murder, if not the very worst form that can occur in our society, particularly the very violent society that we live in the United States in the 1990's.

Two broad categories of victim-impact evidence are admissible: (1) information revealing the individuality

of the victim, and (2) information revealing the impact of the crime on the victim's survivors. *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991); *State v. Bernard*, 608 So. 2d 966 (La. 1992). Thus while some evidence depicting the impact of the loss on the victim's survivors is permissible, the evidence may not stray into detailed descriptions of the good qualities of the victim, particularized narrations of the sufferings of the survivors, or the opinions the survivors hold with respect to the crime or the murderer. *Bernard*, 608 So. 2d at 972.

Neither the evidence nor the argument in this case violates the parameters for victim-impact evidence set out in *Bernard*. The son's testimony described in a general fashion the impact that his mother's death had on his family. That type of evidence has been held admissible in the sentencing phase of a capital trial by both this court and the Supreme Court. *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991); *Bernard*, 608 So. 2d at 972. Moreover, the prosecutor presented only three victim-impact witnesses at the penalty phase: the victim's mother and two of her children. Their combined testimony, totaling only nine pages of transcript, consisted mainly of a description of the victim and the impact of her death on the survivors, but only in the most general terms.

Similarly, the prosecutor's closing argument did not descend into a detailed description of the victim, but rather made only general observations indicating that she had been a hard-working and responsible provider to her children. Moreover, the portion of the closing argument suggesting that the victim's occupation as a

police officer made defendant more worthy of death could hardly have injected an arbitrary factor into the proceedings, because the capital sentencing scheme required the jury to find that status before it could return a death verdict.

Prosecutor's Failure to Disclose Exculpatory Evidence

Defendant claims that the prosecutor withheld exculpatory evidence regarding the 1989 murder at the direction of a drug dealer. Defendant was not prosecuted for the crime and gave conflicting accounts regarding his involvement. As a result, the prosecutor in this case presented no evidence about it during its case-in-chief in the penalty phase. However, in order to impeach one expert's report indicating that defendant only witnessed the crime, the prosecutor later introduced another expert's report in which defendant evidently admitted shooting at the victim.

Appellate counsel argues "[o]n information and belief" that the prosecutor withheld exculpatory information about the crime "while arguing in direct contradiction to it." Consequently, he contends that the prosecutor violated the rule set out in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. However, defendant provides absolutely no factual support to bolster his claim that the prosecutor possessed any exculpatory evidence. The simple fact that the prosecutor did not introduce evidence about the 1989 incident does not show that the prosecutor possessed exculpatory evidence regarding that crime.

Exclusion of Mitigation Evidence in the Penalty Phase

Defendant claims that the trial court erred when it prevented him from presenting certain mitigation evidence in the penalty phase.

As discussed above, at a hearing seeking funds for an expert on prison life, the court initially stated that testimony from the expert would not be admissible during the penalty phase. Later during the hearing, the court clarified that it would limit defendant to evidence of the mitigating circumstances in La. Code Crim. Proc. art. 905.5. The court ultimately refused to provide funds for the expert, and the defendant objected for the record.

During the penalty phase, defendant presented testimony from an expert social worker, Dr. Cecile Guin, who testified about the decreasing number of incidents for which defendant had been disciplined since his incarceration. She explained that when defendant is "in a large group, if it's lots of people, lots of chaos, he doesn't do well. But if you leave him alone, put him in a, you know, a structure with a controlled environment, then he does much better." The defense then asked if defendant could "adequately function in a structured environment such as prison?" The court sustained the prosecutor's objection to the question.

Both this court and the Supreme Court have repeatedly stressed that a capital defendant has the right to introduce virtually any evidence in mitigation during the penalty phase of a capital trial. *Lockett v. Ohio*, 438 U.S. 586, 605–606, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); *State ex rel. Busby v. Butler*, 538 So. 2d 164

(La. 1988). That evidence includes "*any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 98 S. Ct. 2954 (emphasis added). "The nature of the penalty phase at a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without such information, a jury cannot make the life or death decision in a rational and individualized manner." *Busby*, 538 So. 2d at 169 (citing *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir. 1985)). *See also Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986) (barring evidence on defendant's good behavior while in prison violates his right to present all relevant mitigation evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) (refusal to consider family history and childhood abuse of sixteen-year-old defendant facing the death penalty violates Eighth Amendment). Mitigation evidence bearing on the "life or death" sentencing decision is, of necessity, crucial. *See State v. Weiland*, 505 So. 2d 702 (La. 1987) (conviction and sentence reversed for erroneous exclusion of "crucial mitigating evidence"). The Due Process Clause does not allow the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L.Ed.2d 393 (1977) (death penalty could not be imposed on basis of confidential information not disclosed to the defense).

Defendant relies on the *Skipper* decision and argues that "defendant's behavior and adaptability to prison life is not to be excluded as 'irrelevant.'" In *Skipper*, a capital defendant was barred from presenting the testimony of two jailers and one "regular visitor" to the effect that he had made a "good adjustment" during his time spent in jail. *Skipper*, 476 U.S. at 3, 106 S. Ct. 1669. The defendant and his wife had already testified that defendant had conducted himself well while incarcerated; however, the Court concluded that this evidence was "the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses — and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges — would quite naturally be given much greater weight by the jury." *Skipper*, 476 U.S. at 8, 106 S. Ct. 1669. The Court reversed the death sentence and held that the exclusion of "relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.*

The instant situation is distinguishable from that in *Skipper*. First, defendant did, in fact, present evidence which revealed that his behavior while incarcerated had shown improvement. In addition, despite a sustained prosecution objection, defendant's expert was able to testify that defendant "does much better" in "a structure with a controlled environment." Under these circumstances, even if the court erred when it sustained the prosecutor's objection, the error did not prevent the jury from considering defendant's ability to

adapt to prison life, nor did it introduce an arbitrary factor into the jury's deliberations during the sentencing phase.

Joint Funding of District Attorney and District Court

Defendant argues that the current scheme under which district attorneys and district judges share the financial resources of the Criminal Court Fund violates separation of powers principles. Specifically, defendant contends that the scheme set out by La. Rev. Stat. 15:571.11 provides the district attorney with authority over the financing of the district court.

However, as discussed above, defendant fails to show that the scheme denied him any funding for experts or investigators to which he was entitled and thus does not show any prejudice resulting from the existing funding scheme. *Cf. State v. Conger*, 483 So. 2d 1100, 1103 (La. App. 4th Cir.), *cert. denied*, 488 So. 2d 199 (La. 1986) (relief not warranted when defendant fails to show prejudice resulting from alleged prosecutorial atmosphere created by statute allowing prosecutor to collect fines paid to Criminal District Court). Moreover, the salaries of the judges are fixed by law and annually appropriated by the Legislature so that the judiciary had no vested interest in the outcome of defendant's case. *See* La. Rev. Stat. 13:102 (salaries of Supreme Court justices); La. Rev. Stat. 13:311 (salaries of appellate judges); La. Rev. Stat. 13:691 (salaries of district court judges). *Cf Augustus v. Roemer*, 771 F. Supp. 1458, 1473 (E.D. La. 1991) (if judges impose fines they will spend, system offends Due Process clause) (citing *Ward v. Village of Monroeville*, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L.Ed.2d

267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 534, 47 S. Ct. 437, 71 L.Ed. 749 (1927)). Finally, "despite the requirement of approval by both the district court and the district attorney, 'neither agency of government may arbitrarily refuse to approve a proper expenditure from [the Criminal Court Fund].'" *State v. Craig*, 93–2525, p. 6 (La. 5/23/94); 637 So. 2d 437, 442 (quoting *State v. Henderson*, 341 So. 2d 879, 882 (La. 1977)). In these circumstances, defendant fails to show any violation of separation of powers principles.

OPPOSITION BRIEF

No. 13-1433

In The Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Statement of the Facts

On January 7, 1993, Kevan Brumfield, Henri Broadway, and West Paul went to Citizens Bank and Trust on Jefferson Highway in Baton Rouge to commit an armed robbery at the bank's night depository box. West Paul drove the car and remained in the vehicle. Brumfield, armed with a .380 caliber handgun, and Broadway, armed with a .25 caliber pistol, lay in wait in bushes immediately adjacent to the night depository box.

A marked police vehicle driven by Corporal Betty Smothers approached the night depository box. Smothers was working in an off-duty capacity to escort Piggly Wiggly Manager Kimen Lee to the bank. Brumfield and Broadway simultaneously ambushed the two women. Brumfield fired six

shots into the driver's window. Five of the shots struck Smothers. At least one of the shots was fired as close as eighteen inches to three feet from the officer. Two of Brumfield's shots also hit Lee. Broadway fired five shots from the rear passenger side of the vehicle. Two rounds were recovered in the unit. At least two rounds struck Lee. Lee managed to drive the vehicle from the passenger side. The bank deposit bag was untouched. Lee survived the attack with eleven bullet holes in her body. She identified Broadway as having looked into the unit after the attack. Brumfield was arrested, and he gave an initial videotaped statement claiming to be the getaway car driver. He later admitted to being Corporal Smothers' shooter.

Petitioner did not take the stand at either phase of the trial. He alleged the defense of alibi even though an eyewitness saw him and Broadway in the store where Smothers was working in uniform some ninety minutes prior to the murder.

Brumfield had a criminal history including felony convictions: (1) an armed robbery conviction of Anthony Miller on December 25, 1992, (2) an armed robbery of Edna Perry on January 2, 1993, (3) an October 13, 1992, conviction for attempted possession of cocaine, and (4) an October 13, 1992, conviction for felony gun theft.

When petitioner murdered Corporal Smothers, he had already pled guilty to attempted possession of cocaine and felony gun theft and was awaiting sentencing. Before the killing, Brumfield told girlfriend Cassandra Holmes he was going to

be sentenced on January 13, 1993, and he wanted to leave her money to live on while he was incarcerated.

During trial penalty phase, Anthony Miller testified that Brumfield armed robbed him on December 25, 1992, shortly after the two met in a bar in Clinton, Louisiana. Petitioner promised to give Miller a ride to Baton Rouge. Instead, petitioner robbed Miller at gunpoint on the side of the road. Miller testified Brumfield took a gold chain, a jacket, and eighty dollars in cash, put a gun to his head, and clicked the trigger. Fortunately, the gun misfired. Clinton Police Chief Eddie Stewart testified Brumfield had been convicted of armed robbery in that case. Edna Perry and her daughter Trina Perkins also testified during the penalty phase. On the evening of

January 2, 1993, the two were walking on a street in the vicinity of Baton Rouge General Hospital when Brumfield drove up beside Ms. Perry, put a sawed-off shotgun in her face, and robbed her of her purse and its contents. When Ms. Perry asked petitioner for her deceased son's pictures inside the purse, Brumfield retorted, "Bitch you dead," as he drove away. Ms. Perry stated she next saw petitioner's face on television, when petitioner had been arrested for murder. She then called police about what Brumfield had done to her only days before the murder. Ms. Perkins was also able to identify Brumfield as her mother's armed robber. Brumfield's armed robberies of Miller and Perry all occurred within two weeks of the murder. Evidence showed Brumfield had the mental ability to plan his criminal activities, and he used crime to get

whatever he wanted. A psychologist testified Brumfield is a sociopath.

II. Procedural History

Petitioner Kevan Brumfield was indicted with the January 7, 1993, first degree murder of Baton Rouge Police Corporal Betty Smothers. Trial began on June 12, 1995. The jury found petitioner guilty of first degree murder on July 2, 1995, and returned a death sentence on July 3, 1995. The jury found three aggravating circumstances applicable: (1) petitioner was engaged in the perpetration or attempted perpetration of armed robbery; (2) the victim was a peace officer engaged in her lawful duties; and (3) the offender knowingly created a risk of death or great bodily harm to more

than one person. Petitioner was sentenced to death on September 18, 1995.

Petitioner subsequently appealed to the Louisiana Supreme Court, which affirmed petitioner's conviction and sentence. *State v. Brumfield*, 96-2667 (La. 10/20/98), 737 So.2d 660. The United States Supreme Court denied review. *Brumfield v. Louisiana*, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999).

Petitioner filed a state application for post-conviction relief on March 16, 2000. On June 16, 2003, petitioner filed a First Amended Petition for Post-conviction Relief designed to incorporate and replace the original petition. In it, he presented the following issues for review: (1) petitioner should be declared mentally retarded under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d

335 (2002); (2) cumulative error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) petitioner's conviction should be overturned due to juror misconduct and impartiality; and (5) other listed claims constituted error.

The trial court ruled as follows on October 23, 2003: (1) petitioner did not carry his burden placing the claim of mental retardation at issue, and petitioner was not entitled to an *Atkins* hearing; (2) petitioner's cumulative error claim was dismissed; (3) petitioner's ineffective assistance of counsel claims were either procedurally barred or without merit; (4) petitioner's juror misconduct and juror impartiality issues were denied for procedural reasons; and (5) petitioner's enumerated claims

were dismissed because they were not proper grounds for post-conviction relief, the claims were not alleged with sufficient particularity, or the claims were already raised on appeal.

On January 8, 2004, petitioner filed a writ, which the Louisiana Supreme Court denied. *Brumfield v. State*, 04-0081 (La. 10/29/04), 885 So.2d 580.

Petitioner filed an application for federal habeas corpus relief on November 4, 2004, alleging: (1) the state court erred in failing to grant relief and in refusing to hold an evidentiary hearing on petitioner's claim of mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) juror misconduct and impartiality due

to pretrial publicity required reversal of the conviction and sentence; and (5) other listed claims, including lack of funding, constituted error. The state contended the petition should be dismissed because adequate and independent state procedural bars precluded relief on some of the claims and on the others, the state court rulings were entitled to a presumption of correctness.

Petitioner filed an amended petition on October 1, 2007, alleging: (1) petitioner is mentally retarded and cannot be executed; (2) lethal injection violates petitioner's right against cruel and unusual punishment; and (3) petitioner's confession was not voluntarily or intelligently made. The state countered that the additional claims were not properly exhausted in state court because the facts and evidence were greatly

expanded and did not "relate back" to petitioner's original petition. Evidence in the amended *Atkins* claim in federal court had never before even been mentioned in state courts.

The magistrate's report recommended dismissal of all claims, except for the *Atkins* claim based on allegations in the amended petition. The report specifically stated:

> Based solely upon the evidence presented at Brumfield's sentencing hearing (and referenced in his amended post-conviction relief application), the Court agrees with the trial judge's conclusion that Brumfield failed to meet his burden of presenting objective factors that put at issue the fact of mental retardation and that he therefore was not entitled to an *Atkins* hearing.

(Petitioner's Appendix D, p. 127a.) Furthermore, it stated:

> Thus, when only the evidence presented for the trial court's review

> at the October 2003 post-conviction relief hearing is considered, the Court finds that the trial judge's conclusion with respect to the need for an *Adkins* [sic] hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law.

(Petitioner's Appendix D, p. 129a.)

Petitioner's amended claim five in state post-conviction proceedings included a generalized lack of funding claim. The magistrate's report found the claim nonreviewable. (Petitioner's Appendix D, p. 116a.) Although the magistrate's report discusses funding also under the *Atkins* claim, no reversible error was found under the funding claim itself. Thereafter, Judge Brady specifically adopted the magistrate judge's report, ruled that petitioner was entitled to an *Atkins* hearing based solely on the amended, expanded petition, and dismissed all

other claims with prejudice. (Petitioner's Appendix C, pp. 99a-100a.)

The *Atkins* hearings were held in federal court during seven days in 2010. After the United States Supreme Court decided *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the state filed its post-hearing brief on September 15, 2011, again alleging no hearing should have been held on the amended and expanded *Atkins* claim. On February 22, 2012, Judge Brady issued a ruling, in which the judge found that—based on the expanded and amended *Atkins* claim and the federal hearings—petitioner was mentally retarded and could not be executed. The lower federal court found that the state judge on post-conviction relief unreasonably applied clearly established United States Supreme Court

law when the state court judge denied petitioner an *Atkins* hearing in state court. This finding by the federal district court judge is entirely contrary to the magistrate's report, which was specifically adopted by the federal district court judge as his own opinion. The federal magistrate's recommendation found that the state trial court's conclusion in October 2003 was "reasonable and in accordance with clearly established federal law," when the state court record alone was reviewed. (Petitioner's Appendix D, p. 129a.)

The state timely appealed to the United States Court of Appeals, Fifth Circuit. On February 28, 2014, the federal appellate court filed an opinion reversing the federal district court's grant of habeas corpus relief. *Brumfield v. Cain*, 744 F.3d 918, 926-27 (5th Cir. 2014). Petitioner's

application for rehearing was denied on February 28, 2014.

Petitioner filed the present application for certiorari with this Honorable Court, wherein petitioner contends (a) a split in the appellate courts exists because of a disagreement as to what is required under *Atkins* for an evidentiary hearing to be ordered, (b) the federal Fifth Circuit erred in applying this court's holdings in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (c) this Honorable Court should vacate the Fifth Circuit opinion and remand the case in light of *Hall v. Florida,* ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014). The state submits the decision

of the federal Fifth Circuit was correct and should be affirmed.

SUMMARY OF THE ARGUMENT

The federal Fifth Circuit court properly followed *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and gave proper deference to the state court's post-conviction relief ruling on the merits that petitioner Brumfield failed to carry his burden of proving he was entitled to an *Atkins* mental retardation hearing. No federal evidentiary hearing should have been held. The federal Fifth Circuit correctly reversed the federal district court's decision. No split in the federal circuit courts of appeals exists in the interpretation as to how *Atkins* should be implemented. The outcome of each of the cases cited by petitioner rests on the unique facts of those

individual cases. The federal Fifth Circuit correctly applied *Pinholster* and gave proper deference under 28 U.S.C. § 2254 (d) (1) and (2) to the state court decision. This court's decision in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), is not applicable to the present case. Louisiana's law regarding mental retardation hearings for capital defendants is completely different from Florida's rigid rule that foreclosed further evidence of intellectual disability, including adaptive deficit testimony, when that capital defendant's IQ score was 70 or above. No remand is necessary. The opinion of the federal Fifth Circuit should be affirmed, and relief to petitioner Brumfield should be denied.

ARGUMENT

The Antiterrorism and Effective Death Penalty Act is applicable. According to statutory requirements, an application shall not be granted unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011), clarified the deference federal courts reviewing state court decisions must apply. The Court noted:

> We first consider the scope of the record for a § 2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State.
>
> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Pinholster, 131 S.Ct. at 1398.

Pinholster noted that it did not matter whether the state court decided the matter on

summary disposition or following an evidentiary hearing. In either event, a state court decision on the merits of an issue is entitled to deference under the AEDPA. *Pinholster*, 131 S.Ct. at 1402-03, and *Harrington v. Richter*, ___ U.S.___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

The federal Fifth Circuit has correctly determined a state court decision is "contrary to clearly established Federal law, as determined by the Supreme Court" if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." A state court decision is an unreasonable application of such

precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." The "unreasonableness" inquiry is objective. A state court's incorrect application of clearly established Supreme Court precedent is not enough to warrant federal relief; such an application must be unreasonable. The state court's factual findings are presumed correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *Coble v. Quarterman,* 496 F3d. 430, 435 (5th Cir. 2007), *appeal after remand* 330 S.W. 3d 253 (Tex.Crim.App. 2010), *cert. denied* ___ U.S. ___ , 131 S.Ct. 3030, 180 L.Ed.2d 846 (2011).

The federal district court's decision to hold federal *Atkins* hearings ignored the import of the

state courts' rulings. Judicial efficiency, comity, and the AEDPA require that some sense of finality attach to state court rulings.

Louisiana's post-conviction relief procedure addresses judicial concerns with "repetitive applications, unnecessary hearings, and administrative difficulties surrounding [the] production of prisoners."[1] Not every post-conviction relief application deserves a hearing. The Louisiana Supreme Court has noted that the post-conviction relief statutes provide for dismissal upon the pleadings, La. Code Crim. P art. 928, summary disposition, La. Code Crim. P. art. 929, disposition based upon an evidentiary hearing, La. Code Crim. P. art. 930, and dismissal based on repetitiveness,

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[1] *Postconviction Procedure*, 41 La. L. Rev. 625, 632 (1981).

La. Code Crim. P. art. 930.4. *State v. Veal*, 559 So.2d 1383, 1384 (La. 1990).

Here, the state courts determined that petitioner's mental retardation claim could be summarily denied as occurred in *Pinholster* and *Harrington*. The judgment of the state court dismissing petitioner's claims on the merits is entitled to AEDPA deference, which should have resulted in the dismissal of all of petitioner's federal habeas claims.

In *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), this Court noted that when deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas

relief. However, because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards. If the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold a hearing.

Applying *Pinholster*, federal courts should not exercise the simple expedient of allowing additional testimony at a new evidentiary hearing as a basis for reversal: "If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 131 S.Ct. at 1400.

A petitioner cannot request an evidentiary hearing and substitute "new" evidence for the

federal court to consider as part of its habeas consideration. Once a state court has ruled on the merits, the federal district court must decide whether the state court's determination based on the state court record alone was unreasonable. Admission of new evidence in federal district courts should be limited to those instances where the petitioner's claim was never reviewed by the state court initially. No federal court evidentiary hearing was appropriate where, as here, the state district court issued a ruling on the claim's merits.

In *Hearn v. Thaler*, 669 F.3d 265 (5th Cir. 2012), *cert. denied* ___ U.S. ___, 133 S.Ct. 73, ___ L.Ed.2d ___ (2012), Hearn was allowed to bring a successive habeas corpus petition alleging he was mentally retarded under *Atkins*. The state courts denied relief on the merits. The state courts had

refused to allow the petitioner to use clinical assessments as a replacement for full-scale IQ scores in measuring intellectual functioning. The Fifth Circuit correctly said the state court's decision was not an unreasonable application of clearly established federal law under 28 U.S.C. §2254 (d)(1), and "under this standard, a federal court may not issue a habeas writ simply because the court concludes the state court incorrectly applied federal law; instead, the state court's application of the law must be 'objectively unreasonable.' *Id.* 'AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt.'" *Hearn*, 669 F.3d at 271. *Hearn* stated that the state court's decision could not have been an unreasonable application of the *Atkins* decision

"because the Supreme Court has not clearly established the precise boundaries of determining mental retardation. When the Supreme Court refuses to provide a specific rule, 'it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Hearn*, 669 F.3d at 272. *Hearn* reasoned that when the *Atkins* court left it up to the states as to how to measure mental retardation, then "it would be wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant's mental retardation." *Id.* Relief was properly denied in *Hearn*.

Here, the trial court correctly concluded no evidentiary hearing on the *Atkins* claims was proper. The state trial court reasoned:

> All right. And the state has already filed a response, and there are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read and cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's [*sic*] testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all on those in Dr. Jordan's report. Dr. Bolter in

> particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

(Petitioner's Appendix F, pp. 171a-172a.) The trial court's denial on the merits of the *Atkins* claim was entirely reasonable. Federal District Court Judge Brady's conclusion that "the state habeas court in this instance clearly pinned its decision on the adaptive skills prong" clearly ignored the fact that the state judge considered petitioner's IQ scores and the doctors' reports. (Petitioner's Appendix B, p. 37a.)

Petitioner's profane, disruptive outburst during this ruling further evidences the fact Brumfield is not mentally retarded but has an impulsivity disorder as diagnosed in petitioner's school records and by the defense trial experts. Petitioner understood the ruling immediately without any explanation from others. Petitioner understood the trial court was ruling against him, and he contemporaneously compared his case to another death penalty case he knew Judge Anderson was presiding over as follows:

> The Defendant: Excuse me. May I say something? If you're going to deny all of this here, I don't even need to be here. You know.
>
> The Court: Well, you need to be there, and you need to be quiet or we are going to put you in the tank—
>
> The Defendant: I don't need to do nothing.

> The Court: --and you can listen to this.
>
> The Defendant: I don't need to do nothing. You're prejudiced against me. I know this. You ain't going to change your damn mind. I ain't going to sit here and let you deny all of this bullshit.
>
> The Court: You know what, you're right. You're not going to sit here.
>
> The Defendant: This is bullshit. That's right.
>
> The Court: We need to take him to the tank right now.
>
> The Defendant: This is bullshit. You know it, mother fucker. You're prejudiced. I know this. That's why you are doing all this against Todd Lee. You think I don't know? I know what kind of judge you is. You're a fucking house judge. That's right.

(Petitioner's Appendix F, pp. 175a-176a.)

The magistrate's report, agreed with the trial court's findings concerning the mental retardation claim:

Based solely upon the evidence presented at Brumfield's sentencing hearing (and referenced in his amended post-conviction relief application), the Court agrees with the trial judge's conclusion that Brumfield failed to meet his burden of presenting objective factors that put at issue the fact of mental retardation and that he therefore was not entitled to an *Atkins* hearing. As noted above, the first objective factor that the defendant must sufficiently put at issue is sub-average intelligence, as measured by standardized IQ tests. As noted above, according to the IQ levels accepted by the U.S. and Louisiana Supreme Courts, sub-average intelligence is 70 or below using the Wechsler scale, and 68 or below using the Stanford-Binet Scale. The IQ score testified to be Dr. Bolter was 75, which is not low enough to be placed in either of those categories of sub-average intelligence.

Furthermore, as to the second objective factor, significant impairment in several areas of adaptive skills, the testimony presented did not indicate that Brumfield was unable to live and function on his own in society or that he lacked the ability to care for

himself, understand and use language, be mobile, or direct his life activities. Dr. Bolter, Dr. Guin, and Brumfield's teacher, Karen Cross, in fact, indicated that a significant part of Brumfield's difficulties actually stem from his attention deficit disorder, for which he does not take medications, and which, while it results in an inability to focus, is not equivalent to mental retardation.

Finally, as to the third objective factor (manifestations of neuropsychological disorder prior to the age of eighteen), none of the defense experts at the sentencing hearing testified that Brumfield was mentally handicapped but rather agreed with Dr. Jordan's assessment that he had an antisocial or sociopathic personality disorder with associated attention and learning difficulties. Brumfield's related attention and learning difficulties were noted to cause him to have a decreased ability to focus and process information; however, Brumfield's experts did not indicate that such difficulties resulted in an inability to function in society and perform the daily tasks of living. Thus, when only the evidence presented for the trial court's review at the October 2003

> post-conviction relief hearing is considered, the Court finds that the trial judge's conclusion with respect to the need for an *A[t]kins* hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law.

(Petitioner's Appendix D, pp. 127a-129a.) A separately alleged funding issue was found by the magistrate to have been properly barred in state court and petitioner had not proved any cause and prejudice. The magistrate thus found the funding issue could not be reviewed. (Petitioner's Appendix D, pp. 116a.) Federal District Court Judge Brady agreed, indicating he considered all pertinent materials and "approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein." (Petitioner's Appendix C, pp. 99a-100a.)

In his brief to this court, petitioner alleges the state trial court denied Brumfield's "petition in its entirety without acknowledging or ruling on any of his requests for funding." (Petitioner's brief, p. 7.) Petitioner also claims to this court that petitioner "repeatedly requested funding to develop his claims, but these requests were ignored by the state habeas court." (Petitioner's brief, p. 28.) The state submits that these factual allegations are not entirely correct. The state trial court made the following ruling about the funding issue:

> In the defendant's reply to the state's response to the amended petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under [La. Code Crim. P. art.] 930.3, and it's not

> set out with enough particularity. Therefore, it will be dismissed.

(Petitioner's Appendix F, p. 181a.)

The state trial court's ruling was correct. Petitioner failed to carry his burden of proof on the merits of his mental retardation claim in state court on post-conviction relief. Due deference should have been given to the state trial court's decision on the merits of this issue. The federal Fifth Circuit's decision to reverse the federal district court and give proper deference to the state court decision was correct. The federal district court should not have granted any additional expanded hearings and should have denied relief summarily.

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), a case decided after

petitioner's conviction and sentence, held that executing mentally retarded offenders is excessive. The Louisiana Supreme Court subsequently acknowledged in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So.2d 835, that it is bound by *Atkins*. *Atkins* left the task of developing appropriate ways to enforce the constitutional restriction against the execution of mentally retarded defendants to the states. As a result, *Williams* held that—until legislative action on the subject—the proper procedure to be used to follow *Atkins* is for the trial courts to treat the issue procedurally as they would pretrial competency hearings. *Williams*, 831 So.2d at 852-58.

The court specifically stated that "not everyone faced with the death penalty sentence will automatically be entitled to a post-*Atkins* hearing.

It will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. A defendant's entitlement to a post *Atkins* hearing will be made on a case-by-case basis." *Williams*, 831 So.2d at 857. *Williams* found universal agreement that mental retardation has three distinct components: (1) sub-average intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage.

In 2003, La. Code Crim. P. art. 905.5.1 was enacted. The statute states the defendant in a capital case shall prove his allegation of mental retardation by a preponderance of the evidence. Mental retardation is defined as a "disability

characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills," and onset of mental retardation "must occur before the age of eighteen years."

I. *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), is inapposite to the present case; no split in the federal courts exists.

Petitioner in this case has misapplied this court's decision in *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), to allege that the state district court was wrong in not granting an evidentiary hearing on the mental retardation issue. *Bies* did not require state courts to hold mental retardation evidentiary hearings in death penalty cases post-*Atkins*. In *Bies*, the defendant was convicted pre-*Atkins* for the aggravated murder, kidnapping, and attempted rape of a ten-

year-old boy. There, the jury recommended a death sentence. The Ohio state supreme court on direct review stated that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but found that "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." *Bies*, 120 S.Ct. at 2148-49, citing the state court decision therein. The Ohio state court then ordered a mental retardation hearing after this court decided *Atkins*, but the federal courts intervened and vacated Bies' death sentence, finding that the Ohio Supreme Court had definitively determined pre-*Atkins* that Bies was mentally retarded and that he was legally entitled to a life sentence. This Honorable Court reversed the federal courts in Bies' case and stated that the lower federal courts had "fundamentally

misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component." In stating that mental retardation as a mitigating factor and mental retardation for purposes of *Atkins* are "discrete issues," this Court stated:

> Most grave among the Sixth Circuit's misunderstandings, issue preclusion is a plea available to prevailing parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding. The Ohio courts' recognition of Bies' mental state as a mitigating factor was hardly essential to the death sentence he received. On the contrary, the retardation evidence cut against the final judgment. Issue preclusion, in short, does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties.

Bies, 556 U.S. at 829, 129 S.Ct. at 2149. Furthermore, *Bies* reiterated that in *Atkins* "[w]e

'le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Bies*, 556 U.S. at 831, 129 S.Ct. at 2150. This Court in *Bies* stated that "it is not clear from the spare statements of the Ohio appellate courts that the issue of Bies' mental retardation under the *Lott* [Ohio state] test was actually determined at trial or during Bies' direct appeal," and the prosecutor in the Ohio state courts had not conceded that Bies was mentally retarded by *Atkins* or by the standard implemented in Ohio. *Bies*, 556 U.S. at 834-35, 129 S.Ct. at 2152. In noting that Bies had not been acquitted in state court and that at the time of Bies' trial a determination of his mental capacity was "not necessary to the ultimate imposition of the death penalty," this Court concluded:

> The federal courts' intervention in this case derailed a state trial court proceeding "designed to determine whether Bies ha[s] a successful *Atkins* claim." 535 F.3d, at 534 (Sutton, J., dissenting from denial of rehearing en banc). Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision. The State acknowledges that Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the postsentencing precedents set in *Atkins* and *Lott*.

Bies, 556 U.S. at 837, 129 S.Ct. at 2153-54.

Here, double jeopardy and issue preclusion are not issues. In the present case, the federal district court did intervene, however, to derail the state's judgment and wrongfully substitute its opinion for the reasonable state court decision on the merits regarding Brumfield's mental capacity. The federal Fifth Circuit correctly analyzed the case under *Atkins* and *Pinholster* and found that

the federal "district court erred when it failed to give the proper AEDPA deference to the state court's decision [and found] [b]ecause the state court's judgment was entitled to AEDPA deference, 'there was no reason for the district court to conduct an evidentiary hearing.'" *Brumfield*, 744 F.3d 918, 926 (5th Cir. 2014), citing reference omitted.

Federal courts are not split as to how *Atkins* is to be implemented. Petitioner alleges that federal circuits hold differing opinions as to when state courts should hold mental retardation evidentiary hearings, and this Court should grant certiorari to review a split in the federal circuits. The state submits that *Atkins* left it to the individual states to determine how the constitutional restriction against employing the

death penalty to mentally retarded defendants is carried out. *Bies* reiterated this standard, and a grant of certiorari is unnecessary. The facts of each case, along with the state's law, determine when evidentiary hearings need to be held.

Burgess v. Commissioner, Alabama Department of Corrections, 723 F.3d 308 (11th Cir. 2013), cited by petitioner, is factually dissimilar to the present case. In 1994, Burgess was convicted of capital murder for the killings of his girlfriend and two of her children. The jury recommended a life sentence by a vote of eight to four, but the Alabama trial judge rejected that recommendation and sentenced Burgess to death, which is a procedural fact which could not have occurred under Louisiana law. Burgess' conviction and death sentence were affirmed on direct appeal. Burgess subsequently

applied for state post-conviction relief. After this Court decided *Atkins*, Burgess asked for state funds and alleged he should not be executed because he was mentally retarded. Alabama denied relief to Burgess without a hearing, and the state trial court specifically found that Burgess had procedurally defaulted on these claims, and "[t]hus the state trial court never considered the substance of Burgess's Eighth Amendment *Atkins* claim." *Burgess*, 723 F.3d at 1311.

In Burgess' case, the sole defense witness during the penalty phase of trial was a neuropsychologist who gave only an "estimate" of that defendant's IQ without administering any intelligence testing personally. Other facts in Burgess' case were that he had a retarded brother and a mentally ill mother, that he failed first grade,

and that he finished ninth grade with all failing grades with the exception of one D. *Burgess*, 723 F.3d at 1312. Alabama denied Burgess "the opportunity not only to have additional experts but also for any expert access to him while in prison." *Burgess*, 723 F.3d at 1319. The Eleventh Circuit reversed the lower court's decision and remanded the case for an evidentiary hearing on mental retardation and a decision on the merits of the *Atkins* claim. In doing so, the Eleventh Circuit acknowledged that an evidentiary hearing on a mental retardation claim was not always required and that "[e]ven though the state would not have been required to provide Burgess with funds for an expert," access for testing should have been allowed. *Burgess*, 723 F.3d at 1321.

Brumfield was sentenced to death after the unanimous twelve-person jury recommended a death sentence. On state post-conviction relief, the trial court issued a ruling on the merits of Brumfield's mental retardation claim after it considered not only the trial testimony but also the allegations presented in petitioner's voluminous application, together with amendments, for post-conviction relief. Trial evidence includes a videotaped post-arrest statement by Brumfield, wherein he initially denied involvement in the case and then stated he was only the getaway driver before he admitted to being one of the shooters.

During Brumfield's trial penalty phase, his mother, father, and older brother testified on defendant's behalf; and Dr. Cecile Guin, a social worker, testified as to Brumfield's social history.

She wrote a twenty-six page detailed report to document Brumfield's background. Ms. Karen Cross, Brumfield's fourth-grade teacher, testified about his aptitude and behavioral problems in elementary school. Dr. John Bolter, a clinical neuropsychologist, explained that Brumfield as a child had an attention deficit disorder and educational problems associated with his bad behavior. As an adult, defendant had an antisocial personality, a borderline general level of intelligence, and, according to the neuropsychologist, Brumfield also had organic amnesia. Dr. Bolter did not give more mental retardation testimony at trial because Dr. Bolter told the defense trial attorneys pretrial that he could not "help" Brumfield's case in this regard. Dr. Bolter could not testify that petitioner was

mentally retarded when the findings, based upon thorough testing, did not lead to that conclusion.

Brumfield never failed a grade in school. In spite of extensive testing during his educational years, Brumfield was never diagnosed with mental retardation, but the evidence did reveal he had behavioral problems. Brumfield, unlike Burgess, was never denied access to any mental health experts for interviews or testing.

On state post-conviction relief, the trial court explained it looked at all the intelligence testing by Drs. Bolter and Jordan. Additionally the trial court stated: "I do not think that the defendant has demonstrated impairment based on the record in adaptive skills." (Petitioner's Appendix F, p. 171a.) From the record, the trial court knew that petitioner owned a car, rented a getaway car in this

case, rented a motel room after the murder, procured the weapons, and was intending to give his girlfriend proceeds from this armed robbery that he had planned. The trial court also knew that petitioner by himself committed two other armed robberies within the two weeks leading up to the murder of Corporal Smothers. Unlike the case in *Burgess*, the state trial judge denied relief on the merits after reviewing all the evidence presented.

The case of *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), is also distinguishable from the present case. In 1988 in Indiana, Allen was sentenced to death in accordance with the jury's recommendation after he was convicted of the murder, felony murder, and armed robbery of Ernestine Griffin. Allen appealed, and during that process the case was remanded for the trial court to

consider evidence of Allen's mental retardation as a mitigating factor. The trial court stated that "'the possibility of the mitigating circumstance of [Allen's] mental retardation' did not outweigh the aggravating circumstance of his crime." *Allen*, 558 F.3d at 660. Indiana banned execution of mentally retarded persons in 1994. Allen's conviction and sentence were affirmed on appeal in 1997. Allen's post-conviction claims were also denied. In March 2002, Allen claimed on federal habeas corpus that he was mentally retarded and should not be executed. Allen subsequently asked the state court for permission to file a successive post-conviction relief petition because *Atkins* prohibited his death sentence. The Indiana court denied relitigation of the claim, and the federal district court denied habeas corpus relief. The Seventh Circuit ruled

that under the circumstances of Allen's case, he was entitled to a hearing on the merits of his *Atkins* mental retardation claim. The Seventh Circuit noted that there had never been a determination as to whether or not Allen was mentally retarded under Indiana law. The case was remanded for a determination on the merits, using Indiana's standard for mental retardation, whether Allen was entitled to relief under *Atkins*.

In the present case, the state district court judge reviewed Brumfield's *Atkins* mental retardation claim using the standard developed in Louisiana. *See* La. Code Crim. P. art. 905.5.1. The state trial court judge referred to both IQ testing and adaptive skills before concluding that Brumfield was not mentally retarded. This was a

decision on the merits, and it was objectively reasonable under the facts of this case.

The federal Fifth Circuit was correct in giving due deference to the state courts' decision. Petitioner's allegation that a split in the federal circuits justifies a grant of certiorari in this case is incorrect.

II. The Fifth Circuit's decision was correct.

The federal Fifth Circuit was correct in reversing the federal district court's decision and in upholding the opinion of the state courts. The state court decision involved a reasonable application of clearly established federal law as determined by this Honorable Court and resulted in a decision based on a reasonable determination of the facts in light of the evidence presented the state court

proceedings, all in accordance with 28 U.S.C. § 2254 (d).

First, the Fifth Circuit's decision as to funding was proper. The Fifth Circuit analyzed relevant cases from this Court to conclude that petitioner never made a threshold showing in state court that any additional funding was necessary. The court reasoned:

> The district court erred in its determination that the state court decision was not entitled to AEDPA deference. In the district court's view, the state court was required to provide Brumfield with the funds necessary to develop his claims. However, there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case. Rather than present cases holding that Brumfield was entitled to funding to develop his prima facie case, the district court faulted the state court for failing to extend the due process precepts in *Atkins*, *Ford*, and *Panetti*

to encompass this aspect of due process. *See Chester*, 666 F.3d at 344 (holding that a state court's decision is not entitled to AEDPA deference under 2254 (d) (1) where the court "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply").

The district court's holding was an unwarranted extension of Supreme Court jurisprudence. *See id.* at 345 ("The first step in determining whether a state court unreasonably applied clearly established federal law is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986), a court is explicitly required to provide an "opportunity to be heard" once the prisoner has made a "substantial threshold showing of insanity." *Panetti*, 551 U.S. at 949 (internal quotation marks and citation omitted). This includes the opportunity to submit expert evidence. *Id.* at 951. However, nowhere does the Supreme Court hold that this opportunity requires the court or the state to provide the prisoner with funds to

obtain this expert evidence. Nor has this circuit recognized that such an established federal right exists. *See Morris v. Dretke*, 413 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J., concurring) ("[T]he State was within its rights to deny [the petitioner] assistance in obtaining intellectual testing [in order to make out a prima facie case of retardation].").

We have explained the due process rights due "under *Ford*[:] [o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (second alteration in original) (quotation omitted). Similarly, "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Id.* Thus, the strictures of procedural due process associated with *Ford* and *Panetti* attach only *after* a prisoner has made a "substantial threshold showing."

> Accordingly, we hold that the state court did not violate § 2254 (d) (1).

Brumfield, 744 F.3d 918, 925-26 (5th Cir. 2014). (Emphasis original.)

In addition, the Eleventh Circuit in *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308, 1321 (11th Cir. 2013), citied by petitioner in his brief to this Court, found that the state was not responsible for providing funds for a mental health expert even though the state should have provided access to that petitioner for testing. Accordingly, the Eleventh Circuit agrees with the Fifth Circuit on this funding issue.

The Fifth Circuit decision should be upheld by this Court. The state trial judge ruled on the funding issue as follows:

> In the defendant's reply to the state's response to the amended

> petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under 930.3, and it's not set out with enough particularity. Therefore, it will be dismissed.

(Petitioner's Appendix F, p. 181a.) Because petitioner did not set forth a particularized need for additional funding, he did not make out a prima facie case or meet his burden of proof for obtaining more money.

Moreover, petitioner completely ignores the fact that the test results relied on by the state trial court are test results from defense experts employed for trial. Petitioner, as an indigent defendant, used public funds to hire his choice of

mental experts. Ironically, when petitioner's own selected experts did not reach the result that petitioner desired, he attempted to have Dr. John Bolter's testimony excluded during the federal hearings. The federal district court judge even partially granted petitioner's request by curtailing the scope of the defense trial expert's testimony when the state called Dr. Bolter to testify at the federal hearings.

The federal Fifth Circuit furthermore correctly found that the state trial courts' rulings involved a reasonable determination of the facts on the merits of the mental retardation claim. The federal appellate court referred to the applicable Louisiana law and determined that the state trial court on post-conviction relief adhered to state cases pertaining to the proper procedure and

standard for reviewing an *Atkins* claim post-trial. *See State v. Dunn* (*Dunn I*), 831 So.2d 862, 884 (La. 2002), *State v. Dunn* (*Dunn II*), 974 So.2d 658 (La. 2008), *State v. Dunn* (*Dunn III*), 41 So.3d 454 (La. 2010), and *State v. Williams*, 831 So.2d 835 (La. 2002). The Fifth Circuit ruled as follows:

> Similarly, the state court's judgment did not violate § 2254 (d) (2). Our review of the record persuades us that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing. The district court erroneously found that the state court rested its ruling on Brumfield's adaptive skills and faulted the state court for failing to provide Brumfield with the requisite funding. The district court also chided the state court for relying on evidence presented for mitigation purposes and deciding Brumfield's claim based on a record which failed to discuss all of the necessary elements. In addition, the district court concluded that the state court wrongly used competency evidence to determine Brumfield's *Atkins* claim.

Contrary to the district court's ruling, the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation. The state court noted that of the two I.Q. tests, one returned a score of 75 and the other returned "a little bit higher I.Q." The state court then properly considered the evidence of adaptive functioning that Brumfield presented. The state court concluded that Brumfield had not "demonstrated impairment in adaptive skills." The district court criticized the state court for not analyzing each sub-factor of the adaptive skills prong, but there is no requirement that the state court articulate all of its reasons. Notably, no one testified that Brumfield was mentally retarded. Indeed the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality. There was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships. Based on the evidence in the record, we conclude that the state court did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue. *See State v.*

Tate, 851 So.2d 921, 942 (La. 2003) (holding that the defendant failed "to establish reasonable grounds that [he] may be mentally retarded"). Thus, the state court's decision does not fall under the exceptions in § 2254 (d) and was entitled to AEDPA deference.

In sum, the district court erred when it failed to give the proper AEDPA deference to the state court's decision. Because the state court's judgment was entitled to AEDPA deference, "there was no reason for the district court to conduct an evidentiary hearing." *Blue v. Thaler*, 665 F.3d 647, 661 (5th Cir. 2011). Accordingly, it was error for the district court to conduct such a hearing, and we therefore disregard the evidence adduced for the first time before the district court for purposes of our analysis under § 2254 (d) (1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Blue*, 665 F.3d at 655-56 ("*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254 (d).").

Brumfield, 744 F.3d at 926-27. This conclusion is correct. Petitioner complained that the Fifth Circuit "fail[ed] to confront the district court's reasoning." (Petitioner's brief, p. 11, note 3.) Petitioner's allegation, however, fails to acknowledge the Fifth Circuit's opinion, including its observation that "[e]ven if we were to consider the new evidence presented to the district court, we likely would hold that Brumfield failed to establish an *Atkins* claim." *Brumfield*, 744 F.3d at 927, note 8.

III. *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), does not necessitate remand in the present case.

In *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), this Court struck down Florida's *per se* rule that a death row inmate could not present any further evidence of

intellectual disability unless he first presented an IQ score of 70 or below. The Court explained that

> Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

Hall, 134 S.Ct. at 1990. The Court in *Hall* studied other states' laws concerning the definition of mental retardation. The *Hall* court even identified the applicable law in Louisiana, La. Code Crim. Proc. Ann., Art. 905.5.1, and commented that Louisiana has "no IQ cutoff." *Hall,* 134 S.Ct. at 1998. In fact, this court noted that "every state legislature to have considered the issue after

Atkins—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida." *Hall*, 134 S.Ct. at 1998. Louisiana's law has no unconstitutional mandatory cutoff rule pertaining to IQ scores. Florida's unconstitutional law is dissimilar to Louisiana's law on the issue of mental retardation.

The state trial court took into account petitioner's IQ tests, as well as his adaptive functioning, in making its decision that Brumfield is not mentally retarded. The federal Fifth Circuit correctly upheld that state courts' decision on the merits.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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REPLY BRIEF

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IN THE
Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner was sentenced to death prior to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). After *Atkins* was decided, the state habeas court denied Petitioner's *Atkins* claim based exclusively on its conclusion that the *pre-Atkins* trial record contained insufficient evidence of mental retardation. The state court refused even to allow Petitioner a hearing on his *Atkins* claim, reasoning that Petitioner "hadn't carried his burden placing the claim of mental retardation at issue" at his penalty phase – a burden that Petitioner could not possibly have known would exist at the time of his trial. Pet. App. 171a-172a. After a federal district court granted habeas relief on Petitioner's *Atkins* claim, the Fifth Circuit reversed, on the ground that the state habeas court's resolution of the *Atkins* issue constituted a reasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

The petition explained that the Fifth Circuit's opinion was both incorrect on the merits and conflicted with authority from the Seventh and Eleventh Circuits. In response, the State has little to say. On the merits, the State relies on *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), which held that a federal habeas court must apply 28 U.S.C. § 2254(d) based on the state court record. But far from being inconsistent with Petitioner's position, *Pinholster* is actually one of the premises of Petitioner's position. The issue presented in this case – whether a state court violates § 2254(d) by treating a petitioner's pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* –

presupposes that the inquiry under § 2254(d) is limited to the state court record. The State attempts to minimize the circuit conflict by citing irrelevant factual differences between the decision below and the out-of-circuit authority, but it fails to reconcile the *legal* standard applied by those circuits with the legal standard applied by the Fifth Circuit below. Those standards are starkly at odds. The Court should grant certiorari to resolve the split in authority, or, at a minimum, grant, vacate, and remand for further consideration in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014).

I. The Fifth Circuit Was Wrong And *Pinholster* Does Not Dictate Otherwise.

The petition presented a multitude of reasons why treating a pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* amounted to an unreasonable determination of the facts, and the State disputes none of them. The State does not dispute, for instance, that the relevance of mental retardation in mitigation and mental retardation for the purposes of *Atkins* are distinct inquiries. It does not dispute that Petitioner had no reason to try to meet the clinical standard for mental retardation at his penalty phase and that, to the contrary, Petitioner had the strategic incentive *not* to use his limited resources to develop evidence of mental retardation at the penalty phase.[1] The State does not

[1] As this Court explained in *Atkins*, defendants may be hesitant to present mental retardation evidence during the penalty phase

dispute that relying solely on the penalty phase record is particularly egregious where, as here, the penalty phase proceeding took place before *Atkins* (or the corresponding state law standard for mental retardation) had been decided.

Instead, the State focuses on this Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) – a case which is simply beside the point. *Pinholster* held that a federal court's analysis of whether a state court violated 28 U.S.C. § 2254(d) must be based on the record that was before the state court. Petitioner accepts that holding, Pet. at 8, as did the district court when it granted habeas relief, Pet. App. 24a ("In all inquiries under § 2254(d), federal review is confined to the record before the state court" (citing *Pinholster*, 131 S. Ct. 1388)). No one contends that the § 2254(d) analysis should take into account evidence that was adduced for the first time in federal court. Indeed, *Pinholster* forms the premise of Petitioner's argument here. The issue presented in this case – whether a state court violates § 2254(d) by treating a petitioner's pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* – *presupposes* that the inquiry under § 2254(d) is limited to the state court

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because that evidence "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321; *see also Bobby v. Bies*, 556 U.S. 825, 836 (2009).

record. Accordingly, *Pinholster* is in no way inconsistent with Petitioner's contention here.[2]

II. The Circuits Are In Conflict.

The State also makes a weak attempt to argue that there is no split among the circuits. First, the State contends, there can be no split because "*Atkins* left it to the individual states to determine how the constitutional restriction against employing the death penalty to mentally retarded defendants is carried out." Resp. Br. at 44-45. Petitioner does not contest that the States have some discretion to implement *Atkins*. But that discretion is not unlimited, and the extent of that discretion is precisely the issue that has divided the circuits. The Seventh and Eleventh Circuits held that denying *Atkins* relief based solely on the trial record warranted habeas relief under § 2254(d); in contrast, the Fifth Circuit concluded that this procedure was permissible and denied relief. The State's contention that Louisiana had the discretionary power to use this procedure is an argument on the merits; it does not

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[2] The State makes much of the magistrate judge's statement that "[b]ased solely upon the evidence presented at [Petitioner's] sentencing hearing," Petitioner failed to put his mental retardation at issue, and the district court's subsequent adoption of the magistrate judge's conclusions. Resp. Br. at 11, 31-32 (quoting Pet. App. 127a). The magistrate judge's statement, however, is not inconsistent with the district court's ultimate conclusion that the trial court should have never based its decision "solely upon the evidence presented at [Petitioner's] sentencing hearing," Pet. App. 127a, in the first place. *See* Pet. App. 36a-38a. Furthermore, even if there were some inconsistency, it is plainly the district court's final opinion and conclusions which control.

rebut Petitioner's contention that the circuits are in conflict.

Second, the State asserts there is no split because *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013), and *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), arose on their own "unique facts." Resp. Br. at 45, 51. Of course, this is true: Burgess and Allen were different defendants from Petitioner, who were sentenced for different crimes than Petitioner. Critically, however, the State does not identify a single factual difference that is relevant to whether the legal reasoning in these cases conflicts with that of the Fifth Circuit here. From a legal perspective, the procedural posture of *Burgess* and *Allen* was materially identical to the procedural posture of the decision below, and yet the Fifth Circuit reached a diametrically opposite conclusion.

In *Burgess*, the Eleventh Circuit expressly held that a state court violates § 2254(d)(2) when it concludes that a petitioner is not mentally retarded under *Atkins* based on a "pre-*Atkins* record [that] was inadequate to reasonably support the state court's findings." 723 F.3d at 1318. The State attempts to distinguish that case on the basis that the petitioner there was sentenced to death by a judge, not a jury, "a procedural fact which could not have occurred under Louisiana law." Resp. Br. at 45. That is a non-sequitur: the identity of the trier of fact at the penalty phase is irrelevant to the reasonableness of relying on the penalty phase record as being determinative of a petitioner's mental retardation.

The State also attempts to distinguish *Burgess* by pointing out that more evidence related to mental retardation was presented at Burgess' penalty phase than at Petitioner's penalty phase. Respondent explains, for instance, that evidence presented at the penalty phase included the history of mental illness in Burgess' family and Burgess' academic problems through to the ninth grade. Resp. Br. at 46-47. Burgess's penalty phase record also included evidence that he had maintained employment and was a caring child. 723 F.3d at 1316-17. Meanwhile, the State argues, Petitioner's penalty phase contained no evidence that Petitioner had "failed a grade in school," and virtually no evidence relevant to mental retardation. Resp. Br. at 49-50.

Petitioner agrees that the penalty phase record in *Burgess* contained more extensive evidence related to mental retardation than this case. But that actually *strengthens* Petitioner's argument that the circuits are in conflict. If the Eleventh Circuit found the penalty phase record in *Burgess* too "inadequate to reasonably support the state court's findings," 723 F.3d at 1318, then it would certainly conclude the same based on the dearth of mental retardation evidence presented at Petitioner's penalty phase.

The State's purported distinction of *Allen* is likewise unpersuasive. In *Allen*, the Seventh Circuit held that a state court acts unreasonably under § 2254(d)(1) by failing to appreciate the distinction between the relevance of mental retardation evidence in mitigation at a pre-*Atkins* penalty phase and mental

retardation for the purposes of *Atkins*. According to the State, *Allen* is distinguishable because, there, the state post-conviction court "denied relitigation" of the petitioner's mental retardation claim based on the sentencing judge's conclusion that "'the possibility of the mitigating circumstance of [Allen's] mental retardation' did not outweigh the aggravating circumstance of his crime." Resp. Br. at 52 (quoting *Allen*, 558 F.3d at 660). Here, on the other hand, "[t]he state trial court judge referred to both IQ testing and adaptive skills before concluding that Brumfield was not mentally retarded." Resp. Br. at 53.

The State's distinction is again a red herring. Here, the state post-conviction court denied Petitioner the opportunity to litigate his mental retardation claim because he "hadn't carried his burden placing the claim of mental retardation at issue" *at his penalty phase*. Pet. App. 171a-172a. As a result, as in *Allen*, the state post-conviction court conflated the trier of fact's "pre-*Atkins* determination that [the petitioner's] mental retardation was not sufficiently mitigating to overcome an aggravating circumstance" with the mental retardation determination mandated by *Atkins*. *Allen*, 558 F.3d at 663.

The State does not dispute that the posture of this case makes it a uniquely strong opportunity to resolve the issue presented. *See* Pet. at 25-26. The district court – the only court to fully review Petitioner's *Atkins* claim – concluded that Petitioner is mentally retarded. And the Fifth Circuit did not reverse that aspect of the district court's decision. This case thus

provides the Court with an opportunity to correct the Fifth Circuit's erroneous application of AEDPA without the complication of any alternative grounds, such as whether Petitioner was in fact mentally retarded.

III. At a Minimum, The Court Should Grant, Vacate, and Remand in Light of *Hall v. Florida*.

In the event this Court does not grant certiorari to resolve the circuit split described above, it remains incumbent upon the Court to remand for reconsideration in light of *Hall*, 134 S. Ct. 1986. The State argues to the contrary, pointing out that Louisiana lacks the same *per se* IQ cut-off that was ruled unconstitutional in *Hall*. That argument is wholly unresponsive to any of the serious concerns raised by Petitioner in his opening brief. Petitioner has never contended that Louisiana's definition of mental retardation is unconstitutional. Petitioner's argument is simply that, given the specific facts of this case, there is reason to believe the Fifth Circuit would have reached a different conclusion if it had had the benefit of this Court's decision in *Hall*. The State completely ignores this risk.

The state court relied on three aspects of Dr. Bolter's testimony at Petitioner's penalty phase proceedings in finding that Petitioner was not mentally retarded: (1) Dr. Bolter's testimony that Petitioner had an IQ of 75; (2) his testimony that Petitioner had an antisocial or sociopathic personality; and (3) his

testimony that Petitioner had "no conscience." Pet. App. 171a-172a. The latter two aspects may be relevant to the determination of an appropriate sentence. They have no relevance, however, as to whether Petitioner is also mentally retarded. As a result, as Petitioner explained in his petition, the single, unexplained IQ score of 75 was the only evidence relevant to mental retardation that the state court relied upon in denying Petitioner's *Atkins* claim. *See* Pet. at 35-36. *Hall* shows that a record of this sort is insufficient to determine whether a petitioner is mentally retarded under *Atkins*. The Court was clear that when "the individual's IQ score is 75 or below," the mental retardation inquiry must "consider factors indicating whether the person had deficits in adaptive functioning," which "include evidence of past performance, environment, and upbringing." 134 S. Ct. at 1996; *see also id.* at 2000 (holding that "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning" (citation omitted)).[3]

Given the importance of this single IQ score to both the state court's and the Fifth Circuit's determinations, *see* Pet. App. 14a, the prudent course is to remand to

---

[3] Louisiana itself recognizes that an IQ score of 75 is consistent with mental retardation and thus requires consideration of adaptive skills. *See State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis. . . Because of the defendant's borderline I.Q. scores, his diagnosis is heavily dependent on his adaptive functioning.").

give the Fifth Circuit the opportunity to consider the effect of *Hall* in the first instance.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
FILED
JAN 20 2015
OFFICE OF THE CLERK

No. 13-1433

IN THE

Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 29, 2014
CERTIORARI GRANTED DECEMBER 5, 2014

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SUPREME COURT, U.S.

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APPENDIX A — RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, NO. 12-30256

Date Filed	Docket Text
03/12/2012	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Burl Cain, Warden, Louisiana State Penitentiary [12-30256] (DDV)
06/06/2012	APPELLANT'S BRIEF FILED by Mr. Burl Cain, Warden, Louisiana State Penitentiary Date of service: 06/06/2012 via US mail - Attorney for Appellant: Burns; email - Attorney for Appellant: Thompson; Attorney for Appellee: Trenticosta [12-30256] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Record Excerpts due on 06/20/2012 for Appellant Burl Cain, Warden, Louisiana State Penitentiary. Appellee's Brief due on 07/09/2012 for Appellee Kevan Brumfield. Paper Copies of Brief due on 06/11/2012 for Appellant Burl Cain, Warden, Louisiana State Penitentiary. [12-30256] (Monisa Leola Thompson)
08/08/2012	APPELLEE'S BRIEF FILED by Appellee Mr. Kevan Brumfield Date of service: 08/08/2012 via email - Attorney for

	Appellants: Burns, Thompson; Attorney for Appellee: Trenticosta [12-30256] REVIEWED AND/OR EDITED. # of Copies Provided: 0 E/Res's Brief deadline satisfied. Reply Brief due on 08/27/2012 for Appellant Burl Cain, Warden, Louisiana State Penitentiary. Paper Copies of Brief due on 08/20/2012 for Appellee Kevan Brumfield. [12-30256] (Nicholas Joseph Trenticosta)
09/13/2012	BRIEFING COMPLETE. Reply Brief deadline canceled [12-30256] (CMB)
01/08/2014	PUBLISHED OPINION FILED. [12-30256 Reversed] Judge: CES, Judge: CDK, Judge: EBC. Mandate pull date is 01/29/2014 [12-30256] (JRC)
02/05/2014	PETITION filed by Appellee Mr. Kevan Brumfield for rehearing [7561544-2]. Date of Service: 02/05/2014 via US mail Attorney for Appellant: Burns; email Attorney for Appellant: Thompson; Attorney for Appellee: Trenticosta [12-30256] REVIEWED AND/OR EDITED. PETITION for rehearing [7561544-2] Number of Copies: 0. Mandate pull date canceled. Paper Copies of Rehearing due on 02/11/2014 for Appellee Kevan Brumfield. Date of Service: 02/05/2014 Document is insufficient for the following

	reasons: copy of court's opinion not attached [12-30256] (Nicholas Joseph Trenticosta)
02/28/2014	COURT ORDER denying petition for rehearing filed by Appellee Mr. Kevan Brumfield [7561544-2] Mandate pull date is 03/07/2014 [12-30256] (MRW)
02/28/2014	OPINION WITHDRAWN. [7540756-2] Mandate pull date canceled. [12-30256] (JMA)
02/28/2014	PUBLISHED OPINION FILED. [12-30256 Reversed] Judge: CES, Judge: CDK, Judge: EBC Mandate pull date is 03/21/2014 [12-30256] (JMA)
03/24/2014	MANDATE ISSUED. Mandate pull date satisfied. [12-30256] (DLJ)

Appendix A

U.S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(BATON ROUGE)
CIVIL DOCKET FOR
CASE #: 3:04-cv-00787-JJB-RLB

Date Filed	#	Docket Text
11/04/2004	1	PETITION for writ of habeas corpus; FILING FEE $ 5.00 RECEIPT # 85033 (nlt) (Entered: 11/05/2004)
09/07/2005	11	Answer to Petition for Writ of Habeas Corpus by Burl Cain, Charles C. Foti, Jr. (BP,) (Entered: 09/07/2005)
09/07/2005	12	MEMORANDUM in Opposition to 1 Petition for Writ of Habeas Corpus filed by Burl Cain, Charles C. Foti, Jr. (BP,) (Entered: 09/07/2005)
06/07/2006	18	Case Budget Proposal by Kevin Brumfield (BP,) (Entered: 06/07/2006)
10/01/2007	30	AMENDED DOCUMENT by Kevin Brumfield. *First Amended Petition for Writ of Habeas Corpus.* (Attachments: # 1 Attachment appendices to petition) (Trenticosta, Nicholas) (Entered: 10/01/2007)

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01/30/2008	35	ANSWER to Complaint by Charles C. Foti, Jr. (Thompson, Monisa) (Entered: 01/30/2008)
01/30/2008	36	MEMORANDUM in Opposition filed by Charles C. Foti, Jr. (Thompson, Monisa) (Entered: 01/30/2008)
04/15/2008	37	REPORT AND RECOMMENDATIONS ...It is recommended that the 1 Petition for Writ of Habeas Corpus filed by Kevan Brumfield, be GRANTED IN PART, in that petitioner is entitled to an evidentiary hearing relative to his Atkins claim, and DENIED IN PART, in that all of the petitioner's remaining claims should be dismissed with prejudice. It is further recommended that, prior to an evidentiary hearing being conducted relative to petitioner's Atkins claim, the State be allowed the opportunity to conduct discovery and retain experts to rebut the prima facie case submitted by the petitioner.... Objections to R&R due by 4/29/2008. Signed by Magistrate Judge Christine Noland on 4/15/08. (HCJ,) (Entered: 04/15/2008)
04/25/2008	38	OBJECTION to 37 Report and Recommendations filed by Charles C. Foti, Jr. (Thompson, Monisa) (Entered: 04/25/2008)

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06/30/2008	43	RULING Adopting 37 Report and Recommendations. Accordingly, the 1 petition for Writ of HC is GRANTED IN PART, in that petitioner is entitled to an evidentiary hearing relative to his Atkins claims, and DENIED IN PART, in that all of the petitioner's remaining claims will be dismissed with prejudice. Further, prior to an evidentiary hearing being conducted relative to petitioner's Atkins claim the State will be allowed the opportunity to conduct discovery and retain experts to rebut the prima facie case submitted by petitioner. Signed by Judge James J. Brady on 6/30/08. (PAH,) (Entered: 06/30/2008)
07/12/2010	87	Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 7/12/2010. Witnesses sworn and exhibits filed. Court recesses until 7/13/10 at 8:30 am (Court Reporter S. Thompson.) (PAH,) (Entered: 07/16/2010)
07/13/2010	88	Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 7/13/2010. Witness resumes his testimony. Exhibits filed. Court recesses until 7/14/10 at 8:30 am (Court Reporter

S. Thompson.) (PAH,) (Entered: 07/16/2010)

07/14/2010 89 Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 7/14/2010. Witness resumes testimony. Exhibits filed. Court recesses until 7/15/10 at 9:00 am (Court Reporter S. Thompson.) (PAH,) (Entered: 07/16/2010)

07/15/2010 90 Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 7/15/2010. Witness resumes testimony. Exhibits filed. Witness is sworn and testifies. Court recesses until 7/16/2010, at 9:00 AM. (Court Reporter S. Thompson.) (CMM,) (Entered: 07/20/2010)

07/16/2010 98 Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 7/16/2010. Witness testify. Exhibits filed. Court recesses. The parties shall contact the court for a hearing date to conclude this matter. (CMM,) (Entered: 08/03/2010)

08/03/2010 99 Minute Entry for proceedings held before Judge James J. Brady: Evidentiary Hearing held on 8/3/2010. Witnesses testify. Exhibits filed. Court

recesses until 8/4/2010 at 9:00 AM. (CMM,) (Entered: 08/05/2010)

02/07/2011 101 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Evidentiary hearing before Judge James J. Brady held on 07/12/2010. Court Reporter: Shannon Thompson, CCR. Phone Number: 225-389-3567.

NOTICE RE REDACTION OF TRANSCRIPTS: The parties have five (5) business days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.lamd.uscourts.gov.

Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/25/2011. Redacted Transcript Deadline set for 3/7/2011. Release of Transcript Restriction set for 5/5/2011. (Thompson, Shannon) (Entered: 02/07/2011)

02/07/2011 102 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Evidentiary Hearing before Judge James J. Brady held on 07/13/2010. Court Reporter: Shannon Thompson, CCR. Phone Number: 225-389-3567.

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02/07/2011 105 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Evidentiary hearing before Judge James J. Brady held on 07/16/2010. Court Reporter: Shannon Thompson, CCR. Phone Number: 225-389-3567.

Appendix A

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02/07/2011 106 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Evidentiary hearing before Judge James J. Brady held on 08/03/2010. Court Reporter: Shannon Thompson, CCR. Phone Number: 225-389-3567.

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02/07/2011 107 NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Evidentiary hearing before Judge James J. Brady held on 08/04/2010. Court Reporter: Shannon Thompson, CCR. Phone Number: 225-389-3567.

NOTICE RE REDACTION OF TRANSCRIPTS: The parties have five (5) business days to file with the Court a Notice of Intent to Request

Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.lamd.uscourts.gov.

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03/31/2011 110 Trial Exhibit and Witness List - trial 7/12/10. (PJH) Modified on 4/1/2011 to edit text (PJH). Modified on 4/1/2011 (PJH). (Entered: 03/31/2011)

05/09/2011 111 Post-Hearing Brief Regarding Mental Retardation Claim filed by Kevin Brumfield. (Hudsmith, Rebecca) Modified on 5/10/2011 to edit text (JDL). (Entered: 05/09/2011)

09/15/2011 118 POST-HEARING MEMORANDUM filed by Charles C. Foti, Jr. (Thompson,

		Monisa) Modified on 9/19/2011 to edit text (JDL). (Entered: 09/15/2011)
11/21/2011	121	Brief regarding 118 MEMORANDUM in Opposition *Reply to Respondent's Brief* filed by Kevin Brumfield. (Trenticosta, Nicholas) (Entered: 11/21/2011)
02/23/2012	122	RULING granting 1 Petition for Writ of Habeas Corpus insofar as he is ineligible for execution because he is mentally retarded. Accordingly, it is Ordered that the State is permanently enjoined from executing Brumfield. Signed by Judge James J. Brady on 2/22/2012. (CMM) (Entered: 02/23/2012)
03/06/2012	123	NOTICE OF APPEAL by Burl Cain. Filing fee $ 455, receipt number 053N-791145. (Thompson, Monisa) Modified on 3/8/2012 to edit the text (NLT). (Entered: 03/06/2012)

Appendix A

19TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
NO. 1-93-865

STATE OF LOUISIANA EX REL. KEVAN BRUMFIELD V. BURL CAIN, WARDEN OF LOUISIANA STATE PENITENTIARY

DUE TO THE ABSENCE OF AN OFFICIAL DOCKET FOR THE STATE POST-CONVICTION PROCEEDINGS, THE PARTIES HAVE IDENTIFIED THE FOLLOWING ENTRIES BY TITLE AND DATE:

TITLE	DATE	FILED BY
BRUMFIELD'S EXPEDITED MOTION FOR ORDER ON PETITION FOR POST-CONVICTION RELIEF	3/16/2000	BRUMFIELD
PETITION FOR POST-CONVICTION RELIEF	3/16/2000	BRUMFIELD
STATE'S RESPONSE TO APPLICATION FOR POST-CONVICTION RELIEF	11/03/2000	STATE
BRUMFIELD'S MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF	5/9/2001	BRUMFIELD

Appendix A

BRUMFIELD'S SECOND MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF AND FOR ADDITIONAL TIME TO AMEND THE PETITION	9/5/2001	BRUMFIELD
BRUMFIELD'S MOTION FOR ADDITIONAL TIME TO AMEND HIS PETITION FOR POST-CONVICTION AND TO CONTINUE THE HEARING	11/19/2002	BRUMFIELD
MOTION TO SUSPEND STATE'S FILING DELAYS AND FOR A STATUS CONFERENCE	4/10/2003	STATE
FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF	6/26/2003	BRUMFIELD
STATE'S ANSWER TO FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF	8/21/2003	STATE
BRUMFIELD'S REPLY TO THE STATE'S RESPONSE TO HIS FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF	9/23/2003	BRUMFIELD

Appendix A

HEARING ON MOTIONS [DENYING PETITION IN ITS ENTIRETY]	10/23/2003	COURT
TRANSCRIPT OF 10/23/2003 HEARING FILED	10/28/2003	COURT

Appendix A

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2004-KP-0081

KEVAN BRUMFIELD
STATE OF LOUISIANA

DUE TO THE ABSENCE OF AN OFFICIAL DOCKET FOR THE STATE POST-CONVICTION PROCEEDINGS, THE PARTIES HAVE IDENTIFIED THE FOLLOWING ENTRIES BY TITLE AND DATE:

APPLICATION OF KEVAN BRUMFIELD FOR SUPERVISORY WRITS AND APPENDIX OF EXHIBITS	01/08/2004	BRUMFIELD
DENIAL OF APPLICATION FOR SUPERVISORY WRITS	10/29/2004	COURT

Appendix A

STATE OF LOUISIANA VS. KEVAN BRUMFIELD.
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
CASE NO. 1-93-865
SECTION: I

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APPENDIX B — EXCERPTS FROM MINUTES OF COURT FOR FEBRUARY 3, 1993, FEBRUARY 4, 1993, AND APRIL 28, 1993, PARISH OF EAST BATON ROUGE, 19TH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

KEVAN BRUMFIELD

CASE NO. 1-93-865 SEC. I

PARISH OF EAST BATON ROUGE
19TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
HON. RALPH TYSON

MINUTES OF COURT

THE NINETEENTH JUDICIAL DISTRICT COURT, CRIMINAL SECTION I, THE HONORABLE CARL A. GUIDRY, JUDGE *PRO TEMPORE* PRESIDING, WAS OPENED PURSUANT TO ADJOURNMENT. PRESENT IN COURT: MR. BRENT STOCKSTILL; MS. BRENDA CRESWELL; MR. AARON BROOKS; MR. CARSON MARCANTEL; MS. SUE BERNIE, ASSISTANT DISTRICT ATTORNEYS AND MR. DOUG MOREAU DISTRICT ATTORNEY; MS. LANELL DIDIER, COURT REPORTER; AND MS. LINDA PHILLIPS, MINUTE CLERK.

WEDNESDAY, FEBRUARY 3, 1993: CHARGE: FIRST DEGREE MURDER. This matter came

before the court for a *ex parte* motion, pursuant to previous assignment. The accused was present in court, represented by counsel, Mr. Edward R. Greenlee and Mr. Marty White. Mr. Doug MOREAU, District Attorney, was present for the State of Louisiana. The defense motion for *ex parte* hearing held. Matter argued and submitted to the Court. Where upon, the Court ruled that the defense request for expert witness funds and to have *ex parte* records sealed is premature. Further the Court ruled the Office of the Public Defender could hire an investigator and they are to keep records of monies spent. The Court would then allot funds for the investigator. The Defense objected to the Court's ruling and advised the Court of their intention to seek writs. The Court allowed the defense until February 12, 1993 to file writs with the First Circuit Court of Appeal.

THURSDAY, FEBRUARY 4, 1993: CHARGE: FIRST DEGREE MURDER. This matter came before the Court, *ex proprio motu.* The Court ordered that the minutes of February 3, 1993 be amended to include the following; the Court will pay any reasonable fee, from the private investigator, but the fee is not to exceed twenty-five hundred ($2,500.00) dollars. The Court ordered that all parties are to notified of the amended minute entry.

***

WEDNESDAY, APRIL 28, 1993: CHARGE; FIRST DEGREE MURDER. This matter came before the Court for an *Ex Parte* Hearing, pursuant to previous assignment. The accused was present in court represented

by Mr. Edward Greenlee and Mr. Marty White, and notice was provided to the State.

Defense counsel moved to stay proceedings on the motion to suppress. The Court, denied the motion. The defense objected and assigned error. The defense gave notice of intent to file writs, the Court allowed 30 days for the defense to perfect writs.

On motion of defense counsel, the Court granted an additional $2,500.00 for general investigative expenses and $2000.00 for investigative expert expense. The Court further ordered that the Office of the Public Defender pay said fees and be reimbursed by the State of Louisiana. Defense counsel objected to the Office of the Public Defender paying the expense fees and assigned error.

The Court ordered all exhibits and the transcript of this hearing are to be sealed and maintained under seal until further orders of this Court.

****

APPENDIX C — TESTIMONY OF VELLA BRUMFIELD, EXCERPT OF TRANSCRIPT OF SENTENCING HEARING OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, CRIMINAL SECTION I, DATED JULY 3, 1995

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

NUMBER: 1-93-865

STATE OF LOUISIANA

VS.

KEVAN BRUMFIELD

TRANSCRIPT OF
SENTENCING HEARING

MONDAY, JULY 3, 1995

THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

* * *

[63]VELLA BRUMFIELD, CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

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DIRECT EXAMINATION

BY MR. BROWN:

Q. STATE YOUR NAME AND ADDRESS FOR THE RECORD, PLEASE.

A. MY NAME IS VELLA BRUMFIELD, 3440 CHIPPEWA, APARTMENT 3.

Q. WHAT'S YOUR RELATIONSHIP TO KEVAN?

A. I'M HIS MOTHER.

Q. HOW MANY CHILDREN DO YOU HAVE?

A. I HAVE SEVEN TOTAL.

Q. AND WHERE IS KEVAN PLACED IN THOSE SEVEN CHILDREN?

A. HE WAS THE SECOND CHILD.

Q. OKAY. DO YOU RECALL THE BIRTH OF KEVAN?

A. YES, I DO.

Q. AND THAT WAS ON JANUARY 7TH?

A. JANUARY 7TH, 1973.

Q. OKAY. AND WHERE WAS THAT?

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A. HE WAS BORN AT EARL K. LONG BUT THEY MOVED HIM TO THE LADY OF THE LAKE BECAUSE HE WEIGHED TWO AND A HALF POUNDS.

Q. HE ONLY WEIGHED TWO AND A HALF POUNDS?

A. YES, SIR.

Q. AND HOW LONG DID HE STAY IN THE HOSPITAL?

A. ABOUT TWO TO THREE MONTHS.

Q. AND WERE THOSE BECAUSE OF COMPLICATIONS BECAUSE HE WAS SO SMALL?

A. YES. HE WAS BORN IN THE SEVENTH MONTH PERIOD.

Q. OKAY. I'D LIKE TO ASK YOU A LITTLE BIT ABOUT YOUR SIDE OF THE FAMILY, KEVAN'S MATERNAL SIDE OF THE FAMILY. WOULD YOU TELL ME A LITTLE BIT ABOUT YOUR MOTHER?

A. MY MOTHER, SHE WAS CREOLE; MIXED BLACK WITH INDIAN AND SHE WORKED FOR THE GOVERNMENT AND SHE WAS A LICENSED [64]BEAUTICIAN.

Q. AND WHAT ABOUT YOUR FATHER?

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A. MY FATHER, HE HAD TWO YEARS OF COLLEGE AND HE WORKED AS HEAD OF A FARMER'S LAND AND HE ALSO WORKED IN INDUSTRIAL WORK.

Q. DO YOU HAVE ANY BROTHERS AND SISTERS?

A. MY SISTER, SHE OWN A BUSINESS IN TEXAS AND MY BABY SISTER, SHE A SCHOOL TEACHER FOR THE MISSISSIPPI SCHOOL BOARD AND MY BROTHER, HE'S A—NEXT TO A MILLIONAIRE. HE IS IN MISSISSIPPI, HE OWN HIS OWN BUSINESS, AND I HAVE ANOTHER SISTER. SHE WORKS FOR THE ARMY.

COURT REPORTER: I'M SORRY. I DIDN'T HEAR THAT.

A. SHE WORKS FOR THE ARMY.

BY MR. BROWN:

Q. CAN YOU TELL US A LITTLE BIT ABOUT KEVAN'S EARLY CHILDHOOD?

A. DURING KEVAN'S EARLY CHILDHOOD, HE WAS DOING—WELL, MY MOTHER HELPED RAISE HIM PART TIME AND ALL BECAUSE I WORKED LIKE TWO JOBS AT THE TIME.

Q. WHERE WAS YOUR MOTHER LIVING AT THAT TIME?

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A. COLUMBIA, MISSISSIPPI.

Q. YOU GO ON.

A. AND WHEN HE WAS LIKE COMING UP, HIS GRANDPARENTS AND HIS DADDY HELPED OUT SOME, BUT THEN AROUND ABOUT—I THINK IT WAS ABOUT THE AGE OF SEVEN OR EIGHT WE SEPARATED AND MY MOTHER TOOK KEVAN UNTIL—AND I TOOK THE OTHER TWO KIDS AND I WENT TO CALIFORNIA.

Q. OKAY. AND DURING THE TIME THAT KEVAN LIVED IN MISSISSIPPI WITH HIS GRANDPARENTS, YOU'RE SAYING YOU WERE IN CALIFORNIA AT THAT TIME. AND HOW OLD WAS KEVAN?

A. HE WAS BETWEEN THE AGES OF LIKE SIX TO SEVEN. [65]SOMETHING LIKE THAT. I DON'T KNOW WHAT AGE BECAUSE WE ONLY STAYED IN CALIFORNIA LIKE FOUR OR FIVE MONTHS AND I RETURNED BACK TO BATON ROUGE.

Q. OKAY. DO YOU KNOW WHAT KEVAN'S LIFE WAS LIKE IN MISSISSIPPI WITH HIS GRANDPARENTS?

A. WELL, HE ENJOYED MY MOTHER WHEN SHE WAS LIVING. IT WAS PRETTY WHERE HE WAS OUT IN THE COUNTRY. WHEN HE RETURNED BACK TO ME IN BATON ROUGE, THAT'S WHEN I STARTED HAVING PROBLEMS, SORT OF CHILDLIKE PROBLEMS.

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Q. OKAY. AND WHAT ABOUT YOURSELF AT THAT TIME? WHAT WERE YOUR CIRCUMSTANCES? WERE YOU WORKING?

A, YES. I WORKED FOR BURGER KING FOR SIXTEEN YEARS AND I WORKED PART TIME CASHIERING NIGHTS.

Q. OKAY. SO YOU WERE HOLDING DOWN TWO JOBS?

A. YES.

Q. DO YOU FEEL—DO YOU HAVE ANY OPINION AS TO WHETHER OR NOT THAT GAVE YOU THE TIME THAT YOU WOULD LIKE TO SPEND WITH YOUR CHILDREN?

A. AS FOR KEVAN, IT BOTHERED HIM A LOT BECAUSE HE DON'T HAVE NOBODY. HE DON'T HAVE A FATHER FIGURE. SOMETIME HIS DADDY COME GET HIM BUT MOST OF THE TIME HE WAS LEFT TO ME. PLUS, I WENT TO SCHOOL ON THE SIDE.

Q. OKAY. DO YOU—YOU—YOU SAY YOU BEGAN TO HAVE PROBLEMS WITH KEVAN WHEN YOU MOVED BACK FROM CALIFORNIA?

A. YES.

Q. CAN YOU GO INTO—EXPLAIN TO THE JURY WHAT YOU MEANT BY THAT.

A. HE MISSED HIS FATHER FIGURE, REALLY, A LOT. BECAUSE I WAS LIKE PART TIME AT SCHOOL, THEN I WORKED PART TIME, EARLY MORNING, THEN I WENT TO BURGER KING IN THE AFTERNOON, SOMETIME I WAS GOING BACK AT NIGHT AND TRAINING FOR BURGER KING AND IT WAS KIND OF LIKE HE WAS USED TO IT PARTIALLY. [66] BUT WHEN MY MOTHER HAD HIM, MY FATHER WAS AROUND AND WHEN I HAD HIM IT WAS JUST ME AND HIM AND HIS DADDY COME GET HIM LIKE ON VISITATION RIGHTS AND STUFF LIKE THAT. BUT HE HAD A STEPFATHER THAT CAME INTO THE HOUSEHOLD WITH HIM ALONE AND IT JUST LIKE HE GOT, I GUESS DISGUSTED.

Q. AND HIS FATHER IS THURMOND ELLIS?

A. THAT'S RIGHT.

Q. HOW LONG WERE YOU AND MR. ELLIS TOGETHER?

A. FROM THE TIME KEVAN WAS LIKE ABOUT FIVE YEARS OF AGE.

Q. Y'ALL NEVER—Y'ALL NEVER MARRIED?

A. NO, WE DIDN'T.

Q. WHEN Y'ALL BROKE UP, HOW DID THAT AFFECT KEVAN?

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A. IT AFFECT HIM A LOT.

Q. HOW DID HE FEEL ABOUT THAT?

A. HE KIND OF PUT ME AT FAULT AND IT WAS NEVER EXPLAINED TO HIM, REALLY, BUT HE STARTED DOING LOTS OF THINGS, YOU KNOW, LIKE—HE WOULD LIKE RUN OFF SOMETIME. GET HIM BACK—YOU KNOW, TO VISIT HIS DAD. I TOOK HIM TO HIS DADDY AND HIS DADDY HAD TO BRING HIM BACK TO ME AND IT START SHOWING—HE WAS A VERY SMART KID. LIKE HE WAS A "A" STUDENT IN THE FIRST GRADE, BUT AFTER THAT HAPPENED, HE CHANGED AND ALL. STARTED GIVING THE TEACHERS AND THINGS PROBLEMS.

Q. NOW WOULD YOU—ABOUT WHAT GRADE—WHAT WAS IT; THIRD GRADE THAT HE STARTED TO GET INTO A LOT OF PROBLEMS AT SCHOOL?

A. YES. HE STARTED DISTRACTING THE CLASS A LOT.

Q. WAS THERE A STEPFATHER IN THE HOME AT THAT POINT?

A. YES, IT WAS.

Q. WAS IT MCDONALD MCTEVIA (SIC)?

A. YES, IT WAS.

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Q, SO TELL US ABOUT KEVAN'S PROBLEMS AT SCHOOL.

A. WELL, AT SCHOOL HE WOULDN'T MAINTAIN HIS SEAT. HE [67]WOULD MAKE A LOUD—HE WAS A VERY FUNNY CHILD. HE LOVED TO MAKE PEOPLE LAUGH. HE HAD THE CLASS LAUGHING A LOT. HE JUST TOOK TO DISTRACTING THE WHOLE CLASS.

Q. AND THAT WAS IN THE THIRD GRADE?

A. THIRD THROUGH THE FIFTH.

Q. OKAY. BETWEEN THE THIRD AND FIFTH GRADE, WAS HE EVER TAKEN OUT OF THE HOUSE AND PLACED ANYWHERE ELSE?

A. HE WAS TAKEN OUT OF THE HOUSE IN HIS FIFTH.

Q. FIFTH GRADE?

A. YES.

Q. AND WHERE WAS HE PLACED?

A. HE WAS TOOK TO GREENWELL HOSPITAL.

Q. OKAY. HE WAS IN THE FIFTH GRADE?

A. YES.

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Q. AND WHAT DID THEY TELL YOU?

A. THEY SAID THAT HE HAD DYSFUNCTIONAL BEHAVIOR. AT THAT TIME THEY DIDN'T HAVE SPECIAL CARE FOR KIDS LIKE HIM. THEY WOULD JUST PUT HIM WITH OTHER KIDS BECAUSE THEY DIDN'T HAVE THE PROGRAM THAT THEY HAVE NOW. IT WAS LIKE HE WAS A CHILD THAT NEEDED MORE SELF-ATTENTION THAN WAS GIVEN TO HIM AND JUST COULDN'T KEEP STILL AT TIMES. HE WAS HYPERACTIVE.

Q. DO YOU RECALL WHETHER OR NOT THEY REFERRED TO IT AS SOME SORT OF ATTENTION DEFICIT?

A. YES. HE WAS GOING TO MENTAL HEALTH ALREADY. BECAUSE I TOOK A COURSE IN PSYCHOLOGY MYSELF, ON THE SIDE, TO DEAL WITH HIM.

Q, DO YOU KNOW WHETHER OR NOT HE WAS PRESCRIBED ANY MEDICINE—

A. YES.

Q. —AS A RESULT OF HIS STAY AT GREENWELL SPRINGS?

A. YES.

Q. WOULD YOU TALK TO THE JURY ABOUT THAT?

[68]A. IT WAS LIKE—I THINK IT WAS CALLED RITALIN. I DON'T KNOW WHAT IT'S LIKE. BUT IT'S LIKE HE HAD A SPECIAL DIET. HE HAD MEDICINE TO BE IN CONTROL. IF HE DIDN'T TAKE THE MEDICINE', HE WAS OUT OF CONTROL.

Q. DID YOU FEEL THAT—DO YOU FEEL THAT THAT MEDICINE HELPED HIM OR DO YOU THINK THAT MAYBE—HOW DID YOU FEEL ABOUT HIS TAKING OF THE MEDICATION?

A. I THINK IT SPEEDED HIM UP. REALLY, I DON'T THINK IT DID HIM ANY GOOD. BECAUSE HE ALMOST WAS THE SAME WHEN HE RETURNED ON THE WEEKEND VISIT. IT DIDN'T REALLY DO HIM ANY GOOD. IT MOSTLY BLEW HIM UP. YOU KNOW, IT CHANGED THE WEIGHT AND EVERYTHING; HIS PERSONALITY.

Q. OKAY. AT THAT TIME YOU'RE TALKING ABOUT BETWEEN THE GRADES OF THIRD AND FIFTH GRADE?

A. YEAH.

Q. WERE YOU IN—WERE YOU AND THE FAMILY—WERE YOU AT ONE RESIDENTIAL LOCATION OR DID YOU MOVE?

A. I STAYED IN THAT PARTICULAR RESIDENCE FOR AT LEAST TEN YEARS.

Q. OKAY. AND WHAT AREA WAS THAT?

A. THIS WAS IN THE ZION CITY AREA.

Q. AFTER THE FIFTH GRADE DID KEVAN'S BEHAVIOR AT SCHOOL GET WORSE OR DID IT GET BETTER?

A. WORSE. THEY MOVED—THEN THEY TOOK HIM IN A WORSE—THEY PUT HIM AT THE—WHICH IS NOT OUR SCHOOL ANYMORE. IT'S MOVED TO ZION CITY. THEY CALL IT—THEY CALL IT—IT'S LIKE FOR HANDICAPPED.

Q. IS IT INDEPENDENCE HOME?

A. NO, THAT BEFORE. THEN THEY PLACED HIM AT INDEPENDENCE HOME AFTER THAT, AFTER THEY TRIED HIM ON THIS. HE STAYED THERE FOR ABOUT A YEAR OR SOMETHING.

Q. OKAY. YOU SAY THAT HIS BEHAVIOR WORSE—GOT WORSE. [69]HOW DID IT GET WORSE?

A. WELL, HE RAN AWAY A COUPLE OF TIMES AND HE WOULD THEN RETURN TO SCHOOL, YOU KNOW. ONE TIME I TOOK HIM BACK. THE JUDGE HAD LET HIM COME HOME LIKE EVERY DAY, BUT HE WAS PICKED UP BY A SPECIAL BUS THAT WAS PROVIDED AND THEN RETURNED TO SCHOOL. THEN HE RAN AWAY AGAIN AND I HAD TO PUT HIM BACK INTO ANOTHER HOME.

Q. DO YOU RECALL WHETHER OR NOT HE WAS—DO YOU RECALL THE NUMBER OF GROUP HOMES KEVAN WAS IN AND OUT OF BETWEEN—

A. YES, I DO.

Q. HOW MANY WERE THERE?

A. IT WAS ABOUT FOUR OR FIVE. HE WAS IN INDEPENDENCE ON LOVER'S LANE. HE WAS IN PONCHATOULA. I FORGOT THE NAME OF IT. HE WAS IN—I CAN'T RECALL THE NAME OF THAT ONE FARTHER OFF, AND THEN HE CAME BACK TO ANOTHER ONE DOWN HERE. I DON'T KNOW THE NAME OF THAT ONE. HE WAS IN GREENWELL SPRINGS.

Q. OKAY. AND THESE WERE BASICALLY PLACES WHERE—WHERE—WHERE TROUBLED YOUNG PEOPLE WOULD—

A. YES.

Q. — HAVE TO BE PLACED?

A. YES.

Q. DID YOU EVER MAKE—HAVE A PICTURE OR RECALL WHETHER OR NOT HIS BEHAVIOR GOT BETTER OR WORSE EACH TIME HE WAS PLACED INTO A DIFFERENT ONE OF THESE?

A. IT CHANGED. ALL IT DID WAS EDUCATED HIM IN THE WRONG DIVISION.

Q. YEAH. SO YOU FEEL THAT—THAT THOSE HOMES ONLY PUT HIM—

A. EDUCATION-WISE—EDUCATION AND CRIMINAL-WISE HE CAME BACK—INCIDENTALLY, HE CAME HOME ONE WEEKEND AND I HAD MINE AND I WAS LOOKING FORWARD IN EDUCATING HIM. [70]EDUCATION-WISE I NEVER HAD NO PROBLEM WITH HIM UNTIL HE ENTERED ALL THOSE HOMES.

Q. OKAY. AND—AND YOU SAY THAT IN THE FIRST AND SECOND GRADE HE WAS A PRETTY GOOD STUDENT?

A. HE WAS A STRAIGHT "A" STUDENT DURING THAT.

Q. BUT AFTER THAT—

A. HE CHANGED ALTOGETHER. COULDN'T MAINTAIN. HE COULDN'T EVEN GET AN EDUCATION.

Q. SO HE WOULD GET INTO FIGHTS WITH THE OTHER KIDS?

A. OTHER KIDS. NOT REALLY FIGHTS, BUT HE WOULD AGGRAVATE THEM SO THAT THE CLASS COULDN'T GO ON, YOU KNOW.

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Q. DO YOU RECALL ANY OF THE TEACHERS THAT HE HAD BETWEEN THE GRADES OF THIRD AND FIFTH GRADE?

A. I DON'T REMEMBER THEIR NAME RIGHT OFF THE BAT BUT I PROBABLY REMEMBER THEIR FACES. I HAVEN'T SEEN THEM. HIS TEACHERS WAS REAL NICE.

Q. AND YOU ATTENDED—YOU KNOW, YOU WENT TO SCHOOL, TO PTA MEETINGS AND THINGS OF THAT SORT?

A. YEAH; TO PTA MEETINGS, PSYCHOLOGISTS MEETINGS. I WENT AND TOOK A COURSE FROM LSU MYSELF TO SPEND TIME—MORE TIME WITH HIM. AS A MATTER OF FACT, I TOOK TWO OR THREE YEARS WITH HIM. THAT'S WHAT I DID FOR MY KIDS.

Q. SO YOU WERE STRUGGLING YOURSELF, WORKING TWO JOBS, BUT YOU FEEL THAT YOU'VE DONE THE BEST YOU COULD FOR KEVAN?

A. YEAH. BECAUSE I TOOK COURSES TO MAINTAIN IT.

Q. DID YOU AT ANY TIME GET A FEELING THAT IT WAS BEYOND WHAT YOU WERE CAPABLE OF TRYING TO CONTROL AT SOME POINT?

A. AT SOME POINT I TRIED TO DISCUSS WITH OTHER PEOPLE HIMSELF AND THE WAY HE WAS,

BUT THEY DIDN'T REALLY—HE WAS SUCH—HE WAS A REALLY CHEERFUL PERSON AND HE MAINTAINED SUCH A COOL WHERE HE WAS AT—HE WAS VERY SMART—THAT IT WAS—BY THE TIME THEY REALIZED WHAT I WAS TALKING ABOUT, IT [71]WAS TOO LATE FOR THEM BECAUSE HE HAD ALREADY HAD GOT AWAY FROM THEM. HE HAD A STRAIGHT—HIS GRADE—HE WAS SMART ENOUGH TO BE PAST THAT AND HE WOULD BE OUT BY THE TIME THEY GOT AROUND TO WHAT I WAS TALKING ABOUT.

Q. DO YOU RECALL WHETHER OR NOT HE WAS EVER PLACED IN MARGARET DUMAS'S MENTAL HEALTH FACILITY?

A. HE WAS THERE; DOWNTOWN AND ON HARDING.

Q. DO YOU RECALL WHETHER OR NOT THEY GAVE HIM ANY MEDICATION IN ORDER TO—

A. YEAH. THEY GAVE HIM MEDICATION. HE WAS ON MEDICATION BUT THE MEDICATION DIDN'T DO IT.

Q. DO YOU RECALL—DO YOU RECALL WHETHER OR NOT ONE OF THE THINGS THAT HE WAS GIVEN TO TRY TO CONTROL HIS BEHAVIOR WAS THORAZINE?

A. YES. HE HAD THAT.

Q. AND HOW DO YOU FEEL THAT MEDICATION AFFECTED HIM?

A. IT AFFECTED HIM A LOT. BECAUSE—I DON'T KNOW. TO ME, IT WAS LIKE A SPEED-LIKE PROCESS. IT DIDN'T SLOW HIM DOWN ANY. IT ONLY PUSHED IT FASTER.

Q. AND LET'S GO BACK TO THE FATHER FIGURE THING. YOU SAY THAT HE HAD A STEPFATHER IN THE HOME AT THAT POINT, MCDONALD ACTEVIA (SIC)?

A. YES.

Q. HOW WAS THEIR RELATIONSHIP?

A. TERRIBLE.

Q. TERRIBLE? AND WHY WAS THAT?

A. BECAUSE HE DRANK ON THE SIDE AND HE REALLY DIDN'T UNDERSTAND KIDS. HE DIDN'T HAVE NONE OF HIS OWN. AND HE PUNISHED KEVAN A LOT BY PUTTING HIM ON HIS KNEES SOMETIME IN THE CORNER AND STUFF AND TO KEVAN, HE DIDN'T ACCEPT HIM AS A FATHER.

Q. AND THIS—AND THIS STEPFATHER DISCIPLINED HIM ALL [72]THE SAME. WERE THERE ANY METHODS OF DISCIPLINE THAT YOU RECALL?

A. I RECALL KEVAN TELLING ME A COUPLE OF TIMES, WHICH I LOOKED INTO IT, THAT HE HAD PUT HIM IN THE CORNER ON SOME HOT RICE AND I TOLD HIM I DIDN'T LIKE HIM DISCIPLINING UNDER HIS TYPE DISCIPLINE BECAUSE I DIDN'T GO FOR THAT AND HE STOPPED. BUT HE DID DO IT. AND HE PUT HIM, I KNOW MYSELF, A COUPLE OF TIMES IN THE CORNER ON ROCKS.

Q. DO YOU RECALL WHETHER OR NOT HE EVER PLACED—AT THE TIME THAT HE WAS PLACING KEVAN IN THE CORNER ON THE HOT RICE OR THE ROCKS WHETHER HE PLACED A TELEPHONE BOOK ON HIS HEAD?

A. HE DID.

Q. AND EVERY TIME THAT KEVAN WOULD SLIP OR FALL THAT HE WOULD HIT HIM OVER THE HEAD WITH THE TELEPHONE BOOK?

A. YES.

Q. DO YOU RECALL ANY—WAS—WAS THIS STEPFATHER—DID HE HAVE MILITARY EXPERIENCE?

A. YES.

Q. OKAY. HE HAD SERVED IN THE MILITARY FOR—DO YOU KNOW HOW LONG?

A. HE HAD A EYE INJURY FROM THAT.

Q. DO YOU RECALL HOW LONG HE WAS IN THE MILITARY?

A. I THINK FOR TWO OR THREE YEARS. I'M NOT QUITE SURE.

Q. DO YOU FEEL THAT HIS EXPERIENCE IN THE MILITARY SORT OF BROUGHT HIM TO COME UP WITH THESE METHODS OF DISCIPLINE THAT HE WOULD USE ON KEVAN AND HIS BROTHER, TEODIS?

A. PROBABLY SO, BECAUSE HE HAD A LOT OF FLASHBACKS. I KNOW HE HAD WHAT YOU CALL FLASHBACKS FROM HIM DURING—WHEN HE WAS STAYING WITH ME. THAT'S WHEN WE SEPARATED.

Q. OTHER THAN THE METHOD WITH THE RICE, DO YOU RECALL ANY OTHER METHODS OF PUNISHMENT THAT HE WOULD ADMINISTER TO KEVAN AND HIS BROTHER?

[73]A. SOMETIMES HE WHIPPED THEM. WHICH, HE WAS TOLD ABOUT IT. I GOT ON HIM ABOUT IT. PROBABLY A LOT THAT I DIDN'T SEE BECAUSE I WAS WORKING. I HAD TWO JOBS AND I WASN'T THERE ALL THE TIME.

Q. SO YOU WERE GONE MOST OF THE TIME AND THEY WERE THERE WITH THEIR STEPFATHER?

A. YEAH. IN THE DAYTIME HE WAS GONE WHILE THEY WERE GONE TO SCHOOL. BUT AT NIGHTTIME HE MOSTLY WAS THERE BECAUSE I WAS AT WORK.

Q. OKAY. AND HE WAS THERE FROM—FROM THE TIME THAT KEVAN WAS IN THIRD GRADE UNTIL THE TIME—HOW LONG WAS HE THERE?

A. HE WAS THERE UNTIL '89. THAT'S WHEN WE SEPARATED, IN '89.

Q. DO YOU RECALL—SO WOULD THAT MAKE IT APPROXIMATELY FROM 1980 TO 1989?

A. SURE.

Q. SO THAT WOULD BE THE TIME THAT KEVAN WAS SEVEN YEARS OLD—AROUND SEVEN YEARS OLD, MAYBE?

A. POSSIBLY.

Q. OKAY, UNTIL THE TIME HE WAS A TEENAGER?

A. YEAH, ABOUT.

Q. DO YOU RECALL ANY SPECIFIC INCIDENT INVOLVING TEODIS AND KEVAN IN WHICH KEVAN—WHICH WAS TRAUMATIC FOR KEVAN?

A. YES. HE MADE A CHOICE BETWEEN ME AND HIS DADDY.

Q. HE MADE A WHAT?

A. CHOICE BETWEEN ME AND HIS FATHER.

Q. TEODIS DID?

A. HE WENT FOR HIS DADDY AND KEVAN WENT TO ME.

Q. OKAY. WHAT WAS THAT THE RESULT OF?

A. CHILD SUPPORT.

Q. NOW DID—DID TEODIS—WHEN—WHEN HE—DID TEODIS CALL HIS FATHER IN REGARD TO COMING OVER TO STAY WITH [74]HIM?

A. YES.

Q. WAS THAT CALL A RESULT OF SOME DISCIPLINE BY HIS STEPFATHER?

A. ONE TIME HE DID.

Q. OKAY. CAN YOU EXPLAIN THAT TO US?

A. BECAUSE HE WAS TELLING THEM WHAT TO DO AND HE WAS PUNISHING THEM AND HE DIDN'T WANT TO BE TOLD WHAT TO DO.

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Q. SO WHAT DID—WHAT DID THE STEPFATHER DO?

A. WELL, I DON'T KNOW WHAT THE PUNISHMENT WAS BUT I KNOW THE RESULTS WAS A ARGUMENT. IT WAS A BIG ARGUMENT. THE FAMILY GOT INVOLVED AND MY MOMMA AND THEM GOT INVOLVED AND IT WAS LIKE A WHOLE BUNCH OF CONFUSION.

Q. WERE YOU IN THE HOME AT THE TIME?

A. AT HOME?

Q. WERE YOU AT HOME AT THE TIME OR WERE YOU WORKING?

A. I WAS AT WORK WHEN IT HAPPENED.

Q. OKAY.

A. I WASN'T AT HOME, SO I DON'T KNOW THE FULL DETAILS. BUT WHEN I RETURNED HOME—

Q. OKAY. DO YOU KNOW WHETHER OR NOT THAT HAD ANY SORT OF EFFECT UPON KEVAN HAVING—CAUSING HIM TO HAVE SOME SORT OF SEIZURE OR ANYTHING OF THAT SORT?

A. HE DID HAVE A SEIZURE BUT IT HAD BEEN SO LONG THAT I CAN'T REMEMBER BECAUSE HE BE LIKE OUT A LOT, IN AND OUT OF A HOME, UNTIL

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SO MANY INCIDENTS HAPPENED IT'S HARD TO RECALL ABOUT HOW FAR BACK IT WAS OR WHAT TIME IT WAS.

Q. MS. BRUMFIELD, YOU WERE MARRIED TO WILLIAM BRUMFIELD?

A. RIGHT.

Q. AND THAT'S THE NAME YOU CARRY RIGHT NOW?

A. RIGHT.

Q. WOULD YOU SAY THAT—THAT KEVAN—COULD YOU GIVE US [75]SOME SORT OF IDEA OF THE FATHER FIGURES THAT PASSED IN AND OUT OF KEVAN'S LIFE DURING THAT TIME?

A. WELL, REALLY MCDONALD ONLY ONE REALLY STAYED THERE, AND OTHER THAN THAT—HE REALLY DIDN'T STAY AT HOME BUT WITH FRIENDS AND YOU KNOW, HE LIVED IN A HOME, REALLY, MOST OF THE TIME.

Q. AND AFTER YOU LEFT ZION CITY, WERE YOU IN AND OUT OF OTHER—SEVERAL PLACES OR DID YOU STAY IN ONE LOCATION?

A. WELL, I LIVED ON PRESCOTT FOR A LONG PERIOD OF TIME AND THEN WHEN THEY CLOSED DOWN I MOVED TO ARDENWOOD AND

THEN BACK TO THE HOUSE ON CHIPPEWA AND WHERE I'M LIVING NOW. WHEN KEVAN WOULD GET IN THESE—IN TROUBLE, HOW WOULD YOU REACT TO THAT?

A. I TRIED TALKING TO HIM AND TELLING HIM BASICALLY THAT JUST NOT TO BE THAT WAY AND EXPLAIN TO HIM RIGHT FROM WRONG.

Q. THANK YOU, MS. BRUMFIELD.

MR. BROWN: I TENDER.

MS. BURNS: THE STATE HAS NO CROSS-EXAMINATION. THANK YOU.

THE COURT: YOU CAN STEP DOWN, MA'AM.

WITNESS EXCUSED

* * * *

APPENDIX D — TESTIMONY OF CECILE GUIN, EXCERPT OF TRANSCRIPT OF SENTENCING HEARING OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, CRIMINAL SECTION I, DATED JULY 3, 1995

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

STATE OF LOUISIANA

VS.

KEVAN BRUMFIELD

NUMBER: 1-93-865

TRANSCRIPT OF
SENTENCING HEARING

MONDAY, JULY 3, 1995

THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

* * *

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[99]CECILE GUIN, CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. BROWN:

Q. DR. GUIN, COULD YOU PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD?

A. MY NAME IS CECILE GUIN. I'VE GOT TWO BUSINESS ADDRESSES. I LIVE IN SHREVEPORT AND MY BUSINESS IS PRIVATE RESEARCH BUSINESS AND IT'S AT 900 PIERREMONT ROAD IN SHREVEPORT. MY OTHER BUSINESS IS THERE IN SHREVEPORT. I WORK FOR—I'M A SOCIAL WORKER FOR LSU SCHOOL OF SOCIAL WORK. I'M HERE ON PART-TIME BASIS HELPING LSU OPEN A OFFICE OF CORRECTIONAL STUDIES.

Q. AND WHAT IS YOUR OCCUPATION?

A. I'M A SOCIAL WORKER.

Q. AND EXACTLY—WHAT EXACTLY DOES SOCIAL WORK INVOLVE?

A. SOCIAL WORK PRIMARILY INVOLVES—IT'S A VERY BROAD SUBJECT THAT PRIMARILY

INVOLVES TRYING TO DETERMINE HOW TO HELP A PERSON FIT INTO SOCIETY, HOW WE HELP PEOPLE FIT INTO SOCIETY. WE DON'T JUST LOOK AT AN INDIVIDUAL PERSON OR WE DON'T LOOK AT THE INDIVIDUAL MIND, WE LOOK AT THE FIT AND TRY TO HELP PEOPLE OR COMMUNITIES OR ORGANIZATIONS HAVE A GOOD AND MEANINGFUL EXISTENCE IN OUR SOCIETY TODAY. SO WE WORK A LOT IN COMMUNITIES AND WE WORK WITH A LOT OF SOCIAL PROBLEMS.

Q. DOES SOCIAL WORK INVOLVE OTHER INTERACTING WITH OTHER DISCIPLINES?

A. YOU CAN COMBINE THE PRACTICE OF SOCIAL WORK WITH ALMOST ANY FIELD; FOR INSTANCE, THERE ARE CLINICAL SOCIAL WORKERS, THERE ARE SOCIAL WORKERS WHO WORK IN THE SCHOOL. MY PRIMARY FIELD IS WITH CRIMINAL JUSTICE. I HAVE SPENT MOST OF MY—MY ADULT CAREER IN THE PRACTICE OF CRIMINAL JUSTICE SOCIAL WORK [100] PRIMARILY WITH LAW ENFORCEMENT AND CORRECTIONS.

Q. WHAT IS THE DIFFERENCE BETWEEN SOCIAL WORK AND SOME OF THE OTHER DISCIPLINES LIKE PSYCHOLOGY?

A. SOMETIMES PEOPLE DON'T REALLY UNDERSTAND THE DISTINCTION BETWEEN

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THE DIFFERENT DISCIPLINES. I LIKE TO TRY TO ALWAYS POINT OUT EXACTLY WHAT OUR FUNCTION IS AS A SOCIAL WORKER AND DISTINGUISH IT FROM SOCIOLOGY WHICH PRIMARILY DEALS WITH HOW MAN ACTS AS A GROUP; IN OTHER WORDS, SOCIOLOGISTS MAY LOOK AT FAMILIES OR MAY LOOK AT POLITICAL BODIES OR—OR MAY LOOK AT DIFFERENT GROUPS OF PEOPLE. PSYCHOLOGY PRIMARILY DEALS WITH THE MIND. IT WILL LOOK AT HOW THE MIND AFFECTS HOW WE INTERACT WITH SOCIETY.

Q. WHAT IS THE BREAKDOWN FROM SOCIOLOGIST AND SOCIAL WORKERS? WHAT'S THE DIFFERENCE BETWEEN A SOCIOLOGIST AND A SOCIAL WORKER?

A. OKAY. I ELUDED TO THAT A MINUTE AGO. A SOCIOLOGIST PRIMARILY WILL LOOK AT GROUP BEHAVIOR IN SOCIETY AS OPPOSED TO HOW A PERSON FITS INTO SOCIETY AND HOW WE CAN MAKE THAT FIT MORE MEANINGFUL AND WORK BETTER FOR OUR SOCIETY.

Q. HOW LONG HAVE YOU BEEN ACTIVE IN THE FIELD OR DISCIPLINE OF SOCIAL WORK?

A. I'VE GOT MY—RECEIVED MY MASTERS DEGREE IN 1978 FROM LSU.

Q. WHEN WERE YOU BOARD CERTIFIED?

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A. I WAS BOARD CERTIFIED—I BECAME A BOARD CERTIFIED SOCIAL WORKER IN 1982, THE SAME YEAR THAT I PASSED THE NATIONAL ACCREDITATION OF ACADEMY OF CERTIFIED SOCIAL WORKERS.

Q. YOU ALSO HAVE A DEGREE IN SOCIOLOGY; DO YOU NOT?

A. RIGHT. MY BACHELOR'S DEGREE IS ALSO FROM LSU AND IT'S IN SOCIOLOGY WITH A MINOR IN PSYCHOLOGY.

Q. WHAT DID THAT TRAINING INVOLVE?

[101]A. WELL, PRIMARILY THE SOCIOLOGY INVOLVED LEARNING—I FEEL LIKE I'M REPEATING MYSELF—BUT LEARNING ABOUT HOW WE BEHAVE IN OUR SOCIETY, HOW SAY A MEMBER OF EAST BATON ROUGE COMMUNITY—MAYBE HOW MY BEHAVIOR IS IN THIS COMMUNITY OR HOW MY BEHAVIOR IS WITHIN MY FAMILY, HOW MY BEHAVIOR MIGHT BE IF I WAS IN A PRISON SYSTEM OR INSTITUTION OR SOMETHING RELATED TO HOW I DEAL WITH OTHER PEOPLE IN SOCIETY.

Q. DID YOU RECEIVE A MINORS IN—MINOR—DID YOU MINOR IN PSYCHOLOGY?

A. CORRECT. I MINORED IN PSYCHOLOGY.

Q. WHEN YOU GOT YOUR MASTER'S DEGREE, WHAT YEAR WAS THAT AND FROM WHAT UNIVERSITY AGAIN?

A. IN 1978, LSU HERE IN BATON ROUGE.

Q. WHAT WAS YOUR FIELD OF STUDY FOR YOUR MASTER'S?

A. IT WAS CORRECTIONS AND COMMUNITY INTERVENTION. I PRIMARILY FOCUSED ON THE CORRECTION SYSTEM. I STUDIED WITH CORRECTIONS AND I DID MY MASTER'S RESEARCH AT ANGOLA STATE PRISON.

Q. DO YOU DO ANY WORK WITH ANY VICTIMS' ASSISTANCE GROUPS?

A. I'M CURRENTLY A MEMBER OF THE STATE—LOUISIANA STATE BOARD FOR CRIME VICTIM ASSISTANCE WHICH IS A—HAS BEEN A—IT'S A BOARD THAT'S BEEN IN EXISTENCE FOR ABOUT EIGHT YEARS AND THE FUNCTION OF THE BOARD IS TO DISTRIBUTE FEDERAL FUNDS THAT ARE COLLECTED THROUGH THE COURT SYSTEM FROM CRIMINAL CASES. THE PRIMARY PURPOSE IS TO TAKE THESE FUNDS AND TRY TO PUT THE FUNDS INTO PROGRAMS THAT WILL HELP CRIME VICTIMS.

Q. WHEN AND WHERE DID YOU GET YOUR DOCTORAL DEGREE?

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A. I WENT BACK TO SCHOOL IN 1984 FOR MY PH.D AND—FROM THE UNIVERSITY OF TEXAS AT ARLINGTON—AND RECEIVED MY PH.D IN SOCIAL WORK PRIMARILY IN RESEARCH AND PLANNING POLICY IN 1991.

Q. PLEASE TELL THE JURY WHAT'S INVOLVED IN ONE'S TRAINING [102]TO RECEIVE A DOCTORATE IN SOCIAL WORK?

A. MY PARTICULAR DEGREE WAS VERY HEAVILY FOCUSED ON RESEARCH AS OPPOSED TO CLINICAL PRACTICE. I PARTICIPATED IN CLASSROOM—STRAIGHT CLASSROOM WORK FOR TWO YEARS AND THEN SPENT ONE YEAR TAKING COMPREHENSIVE EXAMS. AFTER PASSING THOSE IN BOTH THE MANAGEMENT SCHOOL AND IN THE SCHOOL OF SOCIAL WORK THEN I DID MY OWN DOCTORAL RESEARCH HERE IN BATON ROUGE AND THAT TOOK ANOTHER FOUR YEARS TO COMPLETE AND THAT—SHALL I TELL ABOUT MY DISSERTATION IN—

Q. YEAH.

A. I DIDN'T KNOW IF YOU MEANT FOR ME TO TALK ABOUT THAT, TOO. WHEN I DECIDED WHAT TO DO MY DOCTORAL STUDIES ON, I WAS VERY INTERESTED IN THE LOUISIANA CRIMINAL JUSTICE SYSTEM. I HAD ALWAYS WONDERED WHY—WHAT WAS THE DIFFERENCE BETWEEN—EXCUSE ME—WHY SOME CHILDREN

WENT ON TO BECOME CRIMINALS AND WHY SOME CHILDREN DIDN'T. IN OTHER WORDS, I WAS TRYING TO FIGURE OUT A WAY TO DO A STUDY SO THAT I COULD IDENTIFY FACTORS THAT MAY—THAT RESULTED IN SOME KIDS, YOU KNOW, BECOMING LAW-ABIDING CITIZENS AND TRYING TO FIND OUT WHY SOME OTHER KIDS DID NOT REMAIN LAW-ABIDING CITIZENS. I PICKED OUT A GROUP OF YOUTH THAT WERE AT LTI—IT'S NOW CALLED THE JETSON CORRECTIONAL CENTER—HERE IN EAST BATON ROUGE PARISH AND FOLLOWED EIGHT HUNDRED AND THIRTY-TWO MALES THAT LEFT LTI IN 1976 AND SEE WHERE THEY WERE IN 1989. DID EXTENSIVE CRIMINALOGICAL AND CASE HISTORY CHECKS ON THEM AND SAT OUT AT LTI AND READ ALL THEIR FILES FOR A YEAR OR SO AND THEN TRACKED TO SEE WHERE THEY WERE. AS IT TURNED OUT, MOST OF THEM WENT BACK IN THE ADULT CRIMINAL JUSTICE SYSTEM. ALMOST NINETY PERCENT OF THEM HAD COME BACK INTO CONTACT WITH THE LAW. SO IT REALLY WASN'T ENOUGH OF A SAMPLE SO I COULDN'T REALLY TELL WHY SOME OF THEM BECAME LAW-ABIDING CITIZENS AND WHY SOME DID NOT BECAUSE MOST OF THEM DID. BUT ANYWAY, [103]THAT'S BEEN THE FOCUS OF MOST OF MY CRIMINAL JUSTICE WORK, BOTH IN PRACTICE AND RESEARCH, IN TRYING TO IDENTIFY THOSE FACTORS THAT MAKE—THAT RESULT IN PEOPLE WHO BECOME CRIMINALS AND THINKING THAT IF I COULD IDENTIFY

THOSE FACTORS I COULD TURN AROUND AND PUT THEM IN A PROGRAM SO THAT WE CAN PREVENT THE TYPE OF CRIMINAL PROBLEMS THAT WE HAVE TODAY.

Q. IN CONNECTION WITH YOUR DOCTORAL STUDIES OR IMMEDIATELY THEREAFTER, DID YOU PERFORM ANY TYPE OF INTERNSHIP?

A. IN MY—WHEN I WAS WORKING ON MY MASTER'S, I DID MY INTERNSHIP WITH THE LOUISIANA COMMISSION ON LAW ENFORCEMENT WHICH IS A STATE AGENCY THAT'S HOUSED HERE IN BATON ROUGE AND I ALSO WORKED AT THE LOUISIANA COMMISSION ON LAW ENFORCEMENT WHILE I WAS WORKING ON MY MASTER'S AND THEN WAS INVOLVED WITH THE COMMISSION ON LAW ENFORCEMENT MOST OF MY PROFESSIONAL LIFE, HAVING FINISHED MY LAST CONTRACT WITH THEM ABOUT SIX MONTHS AGO.

Q. AFTER YOUR DOCTORAL STUDIES, WHAT WORK HAVE YOU DONE WITH LAW ENFORCEMENT?

A. AS I FINISHED MY DOCTORAL STUDIES, I BECAME A CONSULTANT FOR THE COMMISSION ON LAW ENFORCEMENT AND THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, PERFORMING RESEARCH ACROSS THE STATE ON JUVENILE CRIME. IT'S PRIMARILY A REPORT THAT WE'RE REQUIRED

TO—THE STATE IS REQUIRED TO COMPLETE AND SEND TO WASHINGTON AND THE PURPOSE OF IT IS TO IDENTIFY TRENDS IN JUVENILE CRIME IN THE STATE AND TO IDENTIFY OR ANALYZE THE PROBLEM OF MINORITY OVERREPRESENTATION IN THE JUVENILE JUSTICE SYSTEM.

Q. HAVE YOU EVER WORKED AT THE RUTHERFORD HOUSE OR ANY DRUG ABUSE FACILITIES?

A. AFTER I RECEIVED MY MASTER'S IN 1978 I MOVED TO SHREVEPORT AND WORKED FOR THREE YEARS AT A RESIDENTIAL FACILITY FOR OFFENDERS, BOTH IN PROGRAM PLANNING AND IN [104]DIRECT CLINICAL PRACTICE WITH TEENAGERS. I THEN WAS A PROGRAM DIRECTOR FOR AN OUTPATIENT DRUG ABUSE FACILITY FOR SEVERAL YEARS, PRIMARILY WORKING WITH PRETRIAL DIVERSION PROGRAMS, DEVELOPING PROGRAMS WORKING WITH BOTH THE DISTRICT ATTORNEY'S OFFICE AND THE U.S. COURT SYSTEM.

Q. HAVE YOU TAUGHT IN YOUR FIELD?

A. I TAUGHT AT LSU SHREVEPORT FOR SEVERAL YEARS BEFORE I WENT BACK TO GET MY MASTER—BEFORE I WENT BACK TO GET MY DOCTORATE. I TAUGHT MARRIAGE AND FAMILY LIVING, INTRODUCTION TO SOCIAL WORK. AFTER I RECEIVED MY DOCTORATE I TAUGHT

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AT GRAMBLING STATE UNIVERSITY FOR TWO YEARS IN SOCIAL WORK RESEARCH, CHILD ABUSE AND NEGLECT, GROUP BEHAVIOR, A NUMBER OF DIFFERENT SUBJECTS.

Q. DR. GUIN, WHAT AREA OF IT IN SOCIAL WORK THAT YOUR ACTIVITY IS CONCENTRATED?

A. IN THE CORRECTIONAL FIELD. I DO A FAIR AMOUNT OF CHILD ABUSE AND NEGLECT RESEARCH AS IT RELATES TO THE CRIMINAL PERSONALITY.

Q. CAN YOU TELL US ABOUT YOUR WORK IN THE AREA OF CHILD ABUSE?

A. I REALLY WOUND UP IN DOING RESEARCH WITH CHILD ABUSE AND NEGLECT PRIMARILY BECAUSE OF THE CRIMINAL JUSTICE POPULATION. THERE IS SUCH A DIRECT LINK BETWEEN CHILD ABUSE AND NEGLECT AND THE DEVELOPMENT OF CRIMINAL PERSONALITY THAT I HAD WOUND UP DOING THAT. BUT IT'S SECOND TO MY PRIMARY FOCUS. I DID A LARGE SECONDARY RESEARCH PAPER SEVERAL YEARS AGO ON ALL OF THE—ALL OF THE RESEARCH THAT HAD BEEN DONE ACROSS THE COUNTRY ON HOW CHILDREN DEVELOP INTO DELINQUENTS AND THEN HOW THEY GO ON AND BECOME CRIMINALS AND PRESENTED THAT AT A STATEWIDE CONFERENCE ON CHILD ABUSE AND NEGLECT AND THEN RIGHT NOW

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WE'RE CURRENTLY—THROUGH LSU WE'RE CURRENTLY FINISHING UP A PROJECT WITH OFFICE OF COMMUNITY SERVICES FOR [105] A CHILDREN'S TRUST FUND, LOOKING AT OUR OWN DATA HERE IN LOUISIANA TO SEE WHAT THE LINK IS BETWEEN CHILDREN THAT ARE REPORTED TO THE NEGLECT AND ABUSE AGENCY AND WHAT THE LINK IS BETWEEN THAT POPULATION AND THE POPULATION IN THE ADULT PRISON SYSTEM; IN OTHER WORDS, TRYING TO SEE HOW MANY KIDS ARE ACTUALLY IN THE O.C.S. SYSTEM UNDER NEGLECT AND ABUSE AND THEN LATER ON ALSO TURNED UP IN OUR PRISON SYSTEM.

MR. BROWN: YOUR HONOR, AT THIS TIME WE WOULD TENDER DR. GUIN AS AN EXPERT IN THE FIELD OF SOCIAL WORK DEALING WITH CRIMINAL JUSTICE ISSUES, PARTICULARLY WITH THE DEVELOPMENT OF CRIMINAL BEHAVIOR AND THE RESULTS OF CHILD ABUSE.

THE COURT: MS. BURNS?

[106]CROSS-EXAMINATION ON THE PREDICATE

BY MS. BURNS:

Q. DR. GUIN, JUST A FEW VERY BRIEF QUESTIONS CONCERNING YOUR EXPERTISE. YOU ARE A PH.D, NOT A MEDICAL DOCTOR, FIRST OF ALL; IS THAT CORRECT?

A. DOCTOR OF PHILOSOPHY, RIGHT.

Q. AND IS IT CORRECT TO SAY THAT THE CAPACITY IN WHICH YOU ARE TESTIFYING BEFORE THIS JURY TODAY IS AS WHAT CRIMINAL DEFENSE ATTORNEY REFERS TO AS A MITIGATION EXPERT TO ASSIST THE DEFENSE?

A. NO, THAT'S NOT CORRECT.

Q. IT IS NOT?

A. NO. I'M HERE TO GIVE A SOCIAL HISTORY. I'M A SOCIAL WORKER.

Q. ALL RIGHT. AND IS IT IN CRIMINAL JARGON OF DEFENSE ATTORNEYS—

MR. GREENLEE: WE'LL OBJECT, YOUR HONOR, TO HER CATEGORIZING SOME JARGON OF DEFENSE ATTORNEYS. I WOULD ASK HER TO ASK THE QUESTIONS AS TO WHAT SHE'S HERE TO TESTIFY ABOUT INSTEAD OF TRYING TO INJECT SOME TYPE OF ALLEGATION OF CRIMINAL JARGON OR ANY TYPE OF JARGON BY DEFENSE ATTORNEYS.

THE COURT: OVERRULE THE OBJECTION. WOULD Y'ALL APPROACH THE BENCH?

REPORTER'S NOTE: AT THIS TIME BOTH COUNSEL FOR THE ACCUSED, MR.

GREENLEE AND MR. BROWN, AND COUNSEL FOR THE STATE, MS. BURNS, APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT OUTSIDE OF THE HEARING OF THE JURY.

MR. GREENLEE: NOTE OUR OBJECTION FOR THE RECORD.

THE COURT: THAT'S TAKEN CARE OF. THAT'S THE [107]WAY WE SET IT UP FROM DAY ONE. I NOTED YOUR OBJECTION.

REPORTER'S NOTE: THE MATTER RESUMED AS FOLLOWS WITH ALL PARTIES REMAINING PRESENT IN THE COURTROOM.

BY MS. BURNS:

Q. MA'AM, ARE YOU AWARE—

MR. GREENLEE: EXCUSE ME. CAN WE APPROACH?

THE COURT: YES.

REPORTER'S NOTE: AT THIS TIME BOTH COUNSEL FOR THE ACCUSED, MR. GREENLEE AND MR. BROWN, AND COUNSEL FOR THE STATE, MS. BURNS, APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT OUT OF THE HEARING OF THE JURY.

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MR. GREENLEE: YOUR HONOR, I SENT A LETTER TO THE CITY POLICE CONCERNING THE OFFICERS. I WISH YOU WOULDN'T TURN AWAY. OFFICERS ARE SITTING BEHIND US AS THINGS ARE GOING ON. IT IS—WE ARE—THEY ARE SITTING THERE LAUGHING. I DON'T THINK IT'S PROPER FOR THEM TO SIT THERE AND LAUGH DURING OUR PART OF THE CASE. THIS IS ENTIRELY A SERIOUS MATTER.

THE COURT: IF IT MAKES YOU FEEL ANY BETTER, THEY OCCASIONALLY CHAT WITH EACH OTHER AND THEY OCCASIONALLY SMILE. THEY ARE DOING A JOB HERE. THEY ARE A PART OF THE COURT SYSTEM.

MR. GREENLEE: THEY ARE NOT SHERIFF'S DEPUTIES ASSIGNED TO SECURITY. I DON'T WANT THEM LAUGHING AND TURNING AROUND. I THINK IT'S A VERY SERIOUS MATTER.

THE COURT: I DON'T DOUBT THAT AND I DON'T THINK SOMETHING THIS SERIOUS SHOULD BE SIDETRACKED [108]BY THIS KIND OF OBJECTION. LET'S GO BACK TO WORK.

REPORTER'S NOTE: AT THIS TIME THIS MATTER RESUMED WITH ALL PARTIES REMAINING PRESENT IN COURT.

BY MS. BURNS:

Q. DR. GUIN, ARE YOU AWARE OF THE PROCEDURE THAT WAS FOLLOWED IN THIS CASE TO HAVE YOU HIRED BY THE DEFENSE?

A. I'M AWARE OF THE PROCEDURE THAT I FOLLOWED TO BE HIRED BY THEM.

Q. ALL RIGHT. ARE YOU AWARE OF THE FACT THAT THEY PETITIONED THE COURT FOR A—WHAT THEY REFERRED TO AS A MITIGATION EXPERT; EITHER YES OR NO?

A. NO.

Q. AND IS YOUR PURPOSE IN THIS CASE TO PREPARE A SOCIAL HISTORY FOR THE PENALTY PHASE OF A CAPITAL MURDER CASE?

A. IT IS.

Q. AND HAVE YOU DONE SO PREVIOUSLY IN THE PAST?

A. CAN WE GO BACK TO THE LAST QUESTION THEN?

A. YES. HAVE YOU PREVIOUSLY PREPARED SOCIAL HISTORIES FOR THE PENALTY PHASE OF CAPITAL MURDER CASES FOR THE DEFENSE?

A. WELL, IT'S FOR BOTH PHASES; NOT JUST PENALTY.

Q. FOR THE DEFENSE?

A. YES, I HAVE. BUT IT'S FOR BOTH PHASES, NOT JUST THE PENALTY PHASE.

Q. AND HOW MANY OTHER CASES HAVE YOU DONE THIS IN?

A. THREE.

Q. AND YOU HAVE WORKED FOR THE DEFENSE IN EACH OF THOSE THREE CASES BESIDES THIS ONE; IS THAT CORRECT?

A. CORRECT.

Q. WHAT IS YOUR PERSONAL VIEW ON THE DEATH PENALTY?

MR. BROWN: OBJECTION, YOUR HONOR.

THE COURT: ALL RIGHT. APPROACH THE BENCH.

[109]REPORTER'S NOTE: AT THIS TIME BOTH COUNSEL FOR THE ACCUSED, MR. GREENLEE AND MR. BROWN, AND COUNSEL FOR THE STATE, MS. BURNS, APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT OUT OF THE HEARING OF THE JURY.

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THE COURT: WHAT'S YOUR OBJECTION?

MR. BROWN: RELEVANCE, YOUR HONOR. WHAT DOES HER OPINION ON CAPITAL PUNISHMENT HAVE TO DO WITH THIS?

MS. BURNS: IT GOES TO HER—

THE COURT: SUBJECT TO EXAMINATION FOR BIAS.

MR. BROWN: IN REGARDS TO CAPITAL PUNISHMENT, IT HAS NOTHING TO DO WITH HER OBJECTIVES AS TO HER CONSTRUCTION OF THE SOCIAL HISTORY.

THE COURT: I DISAGREE. OVERRULE THE OBJECTION.

MR. BROWN: PLEASE NOTE OUR OBJECTION TO THE COURT'S RULING FOR THE RECORD.

REPORTER'S NOTE: THE MATTER RESUMED AS FOLLOWS WITH ALL PARTIES REMAINING IN THE COURTROOM:

BY MS. BURNS:

Q. MA'AM, WHAT IS YOUR VIEW ON THE DEATH PENALTY?

A. I HAVE A THREEFOLD VIEW, REALLY, BECAUSE OF THE WORK THAT I DO. FIRST OF

ALL, AS A PERSON THAT'S INVOLVED WITH THE CRIMINAL JUSTICE SYSTEM, I HAVE THE VIEW THAT IT'S INEFFECTIVE. IT OBVIOUSLY GETS RID OF THE PERSON THAT'S BEEN CONVICTED OF THE CRIME.

Q. YOU'VE ANSWERED MY QUESTION. THANK YOU.

MR. BROWN: YOUR HONOR, SHE WAS EXPLAINING HER ANSWER AND SHE WAS CUT OFF. I WOULD ASK THAT SHE BE ALLOWED TO EXPLAIN HER ANSWER IF SHE'S [110]GOING TO BE ASKED THE QUESTION.

MS. BURNS: YOUR HONOR, I AM GOING TO OBJECT TO ANYTHING THAT ENTAILS A THESIS OR AN EXPOSULATION BY THE WITNESS ON THIS. SHE HAS TESTIFIED THAT SHE IS NOT IN FAVOR OF IT. THAT'S ALL I WANT TO HEAR.

THE COURT: WHY DON'T Y'ALL APPROACH THE BENCH AGAIN?

MR. BROWN: SHE SAID—WHEN QUESTIONED, SHE SAID HER VIEWS ARE THREEFOLD. MS. BURNS ASKED HER THE QUESTION. SHE SAID HER VIEWS WERE THREEFOLD; ONE WAS INEFFECTIVE AND SHE WAS GOING TO BEGIN TO EXPLAIN THE

REST OF HER ANSWER. IF SHE'S GOING TO BE ASKED A QUESTION, I ASK THAT SHE BE ALLOWED TO GIVE A FULL ANSWER.

THE COURT: SHE IS TENDERED ON THE PREDICATE. THE ANSWER THAT SHE WAS CUT OFF WAS FURTHER EXPOUNDING ON THE INEFFECTIVENESS AND I DIDN'T APPRECIATE HER EXPRESSING THE OTHER TWO. SHE GAVE—NUMBER ONE, IT'S INEFFECTIVE. AND I THOUGHT SHE WAS EXPOUNDING ON THAT. I WILL LET YOU ASK HER AS TO TWO AND THREE. I DON'T THINK THE REST OF IT IS RESPONSIVE TO WHAT SHE WAS ASKING HER.

MR. BROWN: AGAIN, MY OBJECTION IS CUTTING OFF BEFORE THE WITNESS IS ALLOWED TO GIVE FULL RESPONSE TO HER QUESTION.

THE COURT: I THINK THE RESPONSE WAS IN EFFECT GIVEN, AND I'M GOING TO NOTE YOUR OBJECTION AND OVERRULE YOUR OBJECTION.

THE COURT: I WANT Y'ALL TO UNDERSTAND I AM GOING TO OVERRULE THE OBJECTION, BUT THAT'S SOMETHING—IF YOU WANT TO GET THE OTHER TWO OUT [111]OF HER, THAT'S ALL UP TO YOU.

MS. BURNS: YOUR HONOR, THAT COMPLETES OUR QUESTIONS AS TO THE PREDICATE.

THE COURT: ANY OBJECTIONS TO THE DR. GUIN'S TENDER AS AN EXPERT?

MS. BURNS: NO, YOUR HONOR.

THE COURT: ALL RIGHT. THE COURT WILL ACCEPT—I'M SORRY. THE AREA OF EXPERTISE IS WHAT?

MR. BROWN: I'LL ANSWER THAT, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. BROWN: THE FIELD OF SOCIAL WORK DEALING WITH CRIMINAL JUSTICE ISSUES, PARTICULARLY DEALING WITH THE DEVELOPMENT OF CRIMINAL BEHAVIOR AND THE RESULTS OF CHILD ABUSE.

THE COURT: ALL RIGHT.

[112]CONTINUATION OF DIRECT EXAMINATION

BY MR. BROWN:

Q. DR. GUIN, YOU HAVE—DID YOU HAVE AN OCCASION TO DO A SOCIAL HISTORY ON KEVIN BRUMFIELD?

A. I DID.

Q. COULD YOU PLEASE TELL THE JURY EXACTLY WHAT IS A SOCIAL HISTORY?

A. A SOCIAL HISTORY IS EXACTLY WHAT ITS NAME WOULD IMPLY. IT'S A—AN EXTENSIVE HISTORY OF A PERSON'S LIFE, SO THAT I GO AND FIND EVERY SINGLE SOURCE OF INFORMATION I CAN ABOUT THAT PERSON'S LIFE AND THEN I PRESENT IT IN A PAPER AND TALK ABOUT ALL THE THINGS THAT LED THAT PERSON TO THE POINT AT WHICH THE REPORT IS SUBMITTED.

Q. DID—IN THE COURSE OF DOING THAT SOCIAL HISTORY DID YOU MEET AND TALK WITH KEVAN BRUMFIELD?

A. I DID.

Q. DO YOU SEE HIM IN THE COURTROOM?

A. I DO.

Q. WILL YOU POINT HIM OUT, PLEASE?

A. SITTING RIGHT THERE IN THE PLAID SHIRT.

Q. IN ADDITION TO SPEAKING WITH KEVAN DID YOU CONSULT WITH OTHER SOURCES OR MATERIALS IN DOING THIS SOCIAL HISTORY OF HIM?

A. I DID. DO YOU WANT ME TO TELL YOU WHO I INTERVIEWED?

Q. YES.

A. I INTERVIEWED HIS SCHOOL TEACHERS; TYRONE ALLEN, HIS FIFTH GRADE TEACHER, BARBARA ARCENEAUX, HIS THIRD AND FIFTH GRADE TEACHER, AND KAREN CROSS, HIS FOURTH GRADE TEACHER. I INTERVIEWED FAMILY MEMBERS; THURMOND ELLIS, HIS FATHER; VELLA BRUMFIELD, HIS MOTHER; HIS HALF-SISTER, MICHELLE BRUMFIELD; HIS BROTHER, TEODIS BRUMFIELD; HIS AUNT, JEANETTE CRYER; HIS FATHER'S WIFE, KATHERINE JOHNSON; HIS—THE MOTHER OF TWO OF [113]HIS CHILDREN, MICHELLE HARRIS; AND I HAD TEN OR TWELVE INTERVIEWS WITH HIM. ALL IN ALL WE PROBABLY HAD TWENTY-EIGHT TO THIRTY-TWO SEPARATE INTERVIEWS WITH PEOPLE, INCLUDING KEVAN, AND ALSO TELEPHONE INTERVIEWS WITH DR. BOLTER, THE PSYCHOLOGIST.

Q. DID YOU TALK TO REPRESENTATIVES OF AGENCIES AND HOMES AND SCHOOLS OTHER THAN THE TEACHERS?

A. WE CONTACTED THE FOLLOWING AGENCIES TO OBTAIN RECORDS OF ALL THIS STUFF: OFFICE OF COMMUNITY SERVICES, WHICH IS THE NEGLECT AND ABUSE AGENCY; THE

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DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, WHICH SUBMITTED RECORDS TO ME ON FOUR DIFFERENT GROUP HOMES, AS WELL AS THE FAMILY COURT; INDEPENDENCE HOME, WHICH IS NO LONGER IN EXISTENCE BUT WAS A GROUP HOME HERE FOR EMOTIONALLY DISTURBED CHILDREN; MARGARET DUMAS MENTAL HEALTH CENTER; OUR LADY OF THE LAKE HOSPITAL; EARL K. LONG HOSPITAL; BATON ROUGE GENERAL HOSPITAL; EAST BATON ROUGE JUVENILE COURT; EAST BATON ROUGE SCHOOL BOARD; DR. BRYAN JORDAN, PSYCHOLOGIST; AND DR. JOHN BOLTER NEUROPSYCHOLOGIST; GREENWELL SPRINGS HOSPITAL; AND THE EAST BATON ROUGE PARISH PRISON.

Q. CAN YOU TELL THE JURY WHAT THE ROLE OF THE SOCIAL WORKER IS IN A CAPITAL CASE?

A. I CAN TELL THE JURY WHAT MY ROLE IS. WHAT I DO IN A CAPITAL CASE IS TRY TO DEVELOP A PROFILE OF THE PERSON WHO'S BEEN FOUND GUILTY OF THE CRIME SO THAT EVERYTHING ABOUT HIS LIFE IS KNOWN. MY FEELING—WELL, IT SEEMS THAT THE LARGE PART OF IT IS TO TRY TO—MY ROLE IS TO TRY TO COMMUNICATE HOW THIS PERSON GOT TO THIS POINT IN THEIR LIFE. THAT'S—WHAT I'M TRYING TO DO IS HELP ANSWER THAT QUESTION AND OBJECTIVELY GO BACK THROUGH ALL THE PARTS OF HIS LIFE AND PRESENT EVERYTHING THAT IS KNOWN TO ME TO YOU.

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Q. DR. GUIN, ARE YOU FAMILIAR WITH THE TERM NUCLEUS FAMILY [114]STATUS?

A. NUCLEAR FAMILY.

Q. NUCLEAR FAMILY STATUS?

A. PRIMARILY THAT'S TALKING ABOUT THE FAMILY THAT SOMEBODY HAS RAISED AND ALONG WITH THEIR OTHER SIBLINGS, WHOEVER'S IN THAT FIRST FAMILY THAT THE CHILD IS RAISED WITH.

Q. AND, AGAIN, YOU DID INTERVIEW KEVAN'S NUCLEAR FAMILY MEMBERS?

A. CORRECT.

Q. HOW WOULD YOU DESCRIBE THAT NUCLEAR FAMILY STATUS?

A. KEVAN'S FAMILY THAT HE GREW UP IN WAS VERY CHAOTIC, VERY COMPLICATED. IT WAS A—IT'S A FAMILY THAT I THINK ATTEMPTED TO SOCIALIZE OR HELP THE CHILDREN BECOME GOOD LAW ABIDING CITIZENS AS WELL AS IT COULD, BUT IT WAS—AND DID A GOOD JOB WITH THAT WITH SOME OF THE CHILDREN. SOME OF THE OTHER CHILDREN THAT WERE DAMAGED, IT WAS—THEY HAD SOME PROBLEMS. IT WAS HARDER TO SOCIALIZE THEM. ONE OF THE PRIMARY FUNCTIONS OF A FAMILY IS TO TRY

TO TEACH THE CHILDREN HOW TO FIT INTO SOCIETY AND THIS FAMILY WAS NOT ABLE TO DO THAT.

Q. DID YOU OBTAIN RECORDS FROM EARL K. LONG HOSPITAL IN BATON ROUGE REGARDING THE BIRTH OF KEVAN BRUMFIELD?

A. YES. I HAVE THEM WITH ME. KEVAN WAS BORN IN 1973 AND HE WAS BORN—I KNOW HIS MOM REPORTED TWO POINT FIVE POUNDS, BUT I'VE GONE AND GOT THE OFFICIAL RECORDS. SO I THINK THEY HAVE MEMORY—THEY'RE COUNTING ON THEIR MEMORY AND I GET THE OFFICIAL RECORDS, SO YOU'LL FIND SOME DISCREPANCIES. BUT HE ACTUALLY WEIGHED THREE POINT FIVE POUNDS AND HE WAS NOT BORN PREMATURE. HE WAS BORN ALMOST AT THIRY—THIRTY-SIX TO THIRTY-EIGHT WEEKS GESTATION, WHICH I UNDERSTAND IS JUST ABOUT FULL TERM. SO HE WAS BORN AT THREE POINT FIVE POUNDS AT FULL TERM.

[115]Q. IN THE EXAMINATION OF THOSE RECORDS, DO YOU FIND THAT THERE WERE PROBLEMS ASSOCIATED WITH THAT—THAT LOW WEIGHT LEVEL IN TERMS OF HIS—

A. I KNEW WHEN I INTERVIEWED KEVAN AND LOOKED AT SOME OF THE OFFICIAL RECORDS. I KNEW THERE WAS A PROBLEM THERE BECAUSE I KNOW THAT THERE IS A TREMENDOUS

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PROBLEM WITH CHILDREN THAT ARE BORN AT LOW BIRTH WEIGHT. I THINK—AND I'M NOT A DOCTOR, SO DR. BOLTER WILL HAVE TO ADDRESS THIS, BUT—OR—I MEAN, I KNOW THAT WHEN CHILDREN ARE BORN AT LOW BIRTH WEIGHT AND IT'S A NORMAL NINE-MONTH PERIOD OF TIME THAT IT MEANS THAT SOMETHING HAS GONE WRONG DURING THE PREGNANCY.

Q. DID YOU—DID YOUR EXAMINATION OF THE RECORDS FROM EARL K. LONG INDICATE WHETHER KEVAN HAD ANY MOTOR—ANY PROBLEMS WITH HIS MOTOR FUNCTIONS?

A. THE RECORDS ARE VERY OLD AND I DO HAVE THE RECORDS AND I WENT BACK TO LOOK AT THE MICROFILM. THERE ARE SOME INDICATIONS THAT HE WAS BORN WITH SLOWER RESPONSES THAN NORMAL BABIES. SOME OF THE WORDS I CAN READ, SOME OF THEM, I CAN'T. BUT THERE IS DEFINITELY A INDICATION THAT WHEN HE WAS BORN THEY KNEW THAT SOMETHING WAS WRONG AT THAT POINT.

Q. HOW LONG DID KEVAN STAY IN THE HOSPITAL?

A. EARL K. LONG RECORDS INDICATE THAT HE WAS THERE ONE DAY.

Q. WAS HE TAKEN HOME, OR WHAT HAPPENED TO HIM?

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A. THIS IS WHERE IT BECOMES COMPLICATED. HIS MOTHER REPORTED TO ME THAT HE WAS TRANSPORTED TO OUR LADY OF THE LAKE, BECAUSE WE WENT TO OUR LADY OF THE LAKE BECAUSE I WANTED TO GET THE RECORDS AND TRY TO FIND OUT WHAT KIND OF PROBLEMS HE MIGHT HAVE THAT RELATED TO WHAT WE'RE TALKING ABOUT TODAY AND OUR LADY OF THE LAKE COULD FIND NO RECORDS. I HAVE TWO FAMILY MEMBERS THAT KNOW HE WAS THERE AT OUR LADY [116]OF THE LAKE, BUT STILL NO RECORDS AT OUR LADY OF THE LAKE. I WENT AND MET WITH THE RECORDS ROOM PERSON AT EARL K. LONG AND ASKED IF THAT WAS NORMAL FOR A BABY TO STAY IN THE HOSPITAL ONE DAY WHEN THEY WERE THREE POINT FIVE POUNDS, BECAUSE I KNOW THAT'S LITTLE, AND THEY DID NOT THINK THAT WAS NORMAL SO I THINK THE BABY PROBABLY WENT TO OUR LADY OF THE LAKE BUT I CAN'T GET THE RECORDS.

Q. DID YOU HAVE ANY INFORMATION ABOUT—IT'S A CATHOLIC HOSPITAL. DO YOU HAVE ANY INFORMATION ABOUT ANY RELATIVES OF KEVAN'S WHICH WOULD INDICATE—

A. THAT WAS THE ONLY EXPLANATION I COULD COME UP WITH AND WE TALKED AT LENGTH WITH OUR LADY OF THE LAKE TO TRY TO—I MEAN, REALLY, TO TRY TO SUBSTANTIATE THIS POINT, BECAUSE I THINK IT'S A CRITICAL POINT, AND THEY DID NOT EXPLAIN IT. HIS—

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KEVAN'S GRANDMOTHER, WHO WAS STILL ALIVE AT THAT TIME, WORKED FOR A CATHOLIC BISHOP HERE FOR TWENTY-SOME ODD YEARS AND ALL I COULD FIGURE—I MEAN, THE ONLY LOGICAL LINK I COULD MAKE WAS THAT PERHAPS—AND I TALKED TO THEM ABOUT THIS AND THEY COULDN'T SUBSTANTIATE IT OR NOT SUBSTANTIATE IT—WAS THAT PERHAPS HE HELPED GET THE BABY IN THE HOSPITAL BECAUSE THE MOTHER REMEMBERS KEVAN BEING IN THE HOSPITAL, THE AUNT REMEMBERS HIM BEING IN THE HOSPITAL. I MEAN, MOST OF THE FAMILY REMEMBERS THAT, BUT STILL, NO RECORDS.

Q. AND YOU'RE REFERRING TO BISHOP OTT?

A. THAT'S CORRECT.

Q. AFTER KEVAN WAS TAKEN BACK TO THE HOME, WHERE WAS HE TAKEN? WHAT WAS HIS EARLY LIFE LIKE?

A. KEVAN LIVED WITH HIS MOTHER, AS HIS MOTHER VERIFIED, DURING MOST OF HIS LIFE. HIS FATHER, THURMOND, WAS ACTUALLY ONLY IN THE HOME A COUPLE OF YEARS AFTER KEVAN WAS BORN. HE LEFT THE HOME IN ABOUT 1974. SO KEVAN WAS AT HOME WITH HIS MOM AND THURMOND FROM ABOUT THE TIME HE WAS BORN, FOR A YEAR [117]OR SO. HE REMAINED AT HOME. FOR THE NEXT THREE

YEARS HE HAD ANOTHER STEPFATHER FIGURE IN THE HOME, THROUGH THE AGES OF TWO TO FOUR, RAYMOND ROSS, WHO ALSO PRODUCED SEVERAL OTHER CHILDREN THAT HAVE BEEN RAISED WITH KEVAN. YOU WANT ME TO START TALKING ABOUT THE FIRST GRADE? I MEAN, YOU SAID EARLY LIFE, SO I DIDN'T KNOW HOW FAR I SHOULD GO.

Q. SO WHEN KEVAN ENTERED INTO THE FIRST GRADE, HAD HE AND—FROM YOUR REFERENCE OF THE VARIOUS SOURCES, WERE YOU ABLE TO DETERMINE WHETHER OR NOT KEVAN—KEVAN'S NATURAL FATHER WAS STILL WITH HIS MOTHER, VELLA?

A. NO. THEY SPLIT UP. WHEN THEY SPLIT UP IT WAS NOT A—I DON'T THINK IT WAS A PARTICULARLY HAPPY SPLIT-UP OR—AND FROM SPEAKING WITH BOTH OF THEM DURING THIS WHOLE PROCESS, I KNOW THAT WHEN THEY SPLIT UP THERE WERE, OF COURSE, HARD FEELINGS AND—AND I DON'T THINK THEY REALLY EVER COMMUNICATED VERY MUCH PAST THAT TIME, OR AT LEAST THEY INDICATED TO ME THAT THEY DIDN'T. KEVAN'S EARLY LIFE WAS REALLY, PROBABLY THE HAPPIEST TIME OF HIS LIFE. HIS GRANDMOTHER WAS ALIVE. HE HAD A GRANDMOTHER, HIS MOTHER'S—MS. BRUMFIELD'S MOTHER LIVED IN MISSISSIPPI. SO HE SPENT A LOT OF TIME WITH THE GRANDMOTHERS AND HIS FATHER WAS IN THE

DIRECT NEIGHBORHOOD, AND, YOU KNOW, HE PLAYED A LOT IN THE NEIGHBORHOOD. WHEN HE WENT TO VISIT INTHE COUNTRY, HE PLAYED IN THE COUNTRY AND I SUSPECT THIS WAS PROBABLY THE HAPPIEST PART OF HIS LIFE. I DIDN'T FIND ANY MEDICAL RECORDS OR ANYTHING THAT WOULD INDICATE THERE WAS ANY TRAUMA FROM AFTER THE TIME THAT HE WAS BORN UNTIL AGE FOUR OR FIVE.

Q. BY THE TIME HE ENTERED INTO THE FIRST GRADE, WAS HE IN BATON ROUGE OR MISSISSIPPI?

A. HE ENTERED THE FIRST GRADE IN MISSISSIPPI AND I BELIEVE ATTENDED THE SECOND GRADE THERE. EAST BATON ROUGE PARISH HAS LOST HIS SCHOOL RECORDS AND MISSISSIPPI SCHOOL SYSTEM HAS HIS [118]FIRST AND SECOND GRADE—FIRST GRADE RECORDS, WE KNOW. THEY ARE SENDING THEM. THEY DID NOT GET HERE, BUT THEY DID VERIFY THAT HE WAS THERE.

Q. DO YOU HAVE ANY REPORTS, ANY INFORMATION AS TO HOW KEVAN DID IN THE FIRST OR SECOND GRADE?

A. BOTH KEVAN AND HIS MOTHER REPORTED TO ME THAT HE DID PRETTY WELL IN THE FIRST AND SECOND GRADE, THAT HE SEEMED TO GET ALONG PRETTY WELL. NOW HE DID

NOT REPORT THAT HE HAD A LOT OF THESE CONDUCT DISORDER PROBLEMS IN THE FIRST OR SECOND GRADE AS HE REPORTED TO ME THAT HE HAD LATER ON. SO I THINK IT MUST HAVE BEEN A GOOD ENVIRONMENT FOR HIM. AND, OF COURSE, THE FIRST AND SECOND GRADE DOESN'T REQUIRE ALL THAT MUCH OF CHILDREN. SO I THINK, AGAIN, IT WAS A GOOD TIME FOR HIM.

Q. WHAT ABOUT THE THIRD GRADE?

A. HE EVIDENTLY CAME BACK DURING THE THIRD GRADE AND THAT WAS WHEN HE ATTENDED PARK FOREST. I SPOKE WITH BARBARA ARCENEAUX, WHO IS OUT OF STATE. BUT I DID INTERVIEW HER AND SHE SAID AT THE TIME THAT KEVAN GOT TO THE THIRD GRADE, HE WAS—STARTED OFF THE YEAR PRETTY WELL AND BECAME PROGRESSIVELY—IT DETERIORATED RELATIVELY RAPIDLY. SHE FELT PRETTY MUCH AS—AS—AS MS. CROSS DID, THAT THERE WERE SOME PROBLEMS. SHE DIDN'T KNOW WHAT THE CAUSE OF THE PROBLEMS WERE, BUT SHE KNEW THAT THERE WERE PROBLEMS AND SHE REFERRED HIM FOR AN EVALUATION AT THAT TIME. AS A MATTER OF FACT, SHE ALMOST GAVE THE EXACT SAME REPORT THAT THE FIFTH GRADE TEACHER AND THE FOURTH GRADE TEACHER GAVE IN TERMS OF HIS AGGRESSIVE ACTING OUT WHEN TOUCHED BY OTHER CHILDREN OR AT RECESS.

HE HAD A LOT OF PROBLEMS AT RECESS. HE HAD A LOT OF PROBLEMS IF SOMEBODY SPOKE IN A REAL DISCIPLINARY AUTHORITARIAN MANNER TO HIM. HE COULD NOT STAY IN HIS CHAIR. HE SIMPLY COULDN'T AND—BUT HE DID WELL WHEN THE [119]TEACHERS WOULD SIT DOWN WITH HIM ONE ON ONE. I MEAN, WHAT SHE SAID WAS VERY MUCH WHAT HE SAID.

Q. DID THAT CORRESPOND TO THE ENTRY INTO THE HOUSEHOLD OF STEPFATHER NUMBER FOUR?

A. CORRECT. THAT WAS THE OTHER SIGNIFICANT THING THAT HAPPENED. KEVAN WAS EIGHT YEARS OLD IN 1981. STEPFATHER NUMBER FOUR—THERE WERE SIX FATHER FIGURES THROUGHOUT HIS LIFE AND I TRY TO REFER TO THEM BY NUMBER BECAUSE I KNOW THE FAMILIES STILL LIVE IN THIS COMMUNITY; SOME OF THEM. I THINK IT'S PROBABLY MORE COMPASSIONATE OF THEM NOT TO TALK ABOUT IT. I'M TALKING ABOUT STEPFATHER NUMBER FOUR.

Q. OKAY. AND YOU HAVE—DO YOU HAVE ANY INFORMATION AS TO WHETHER OR NOT STEPFATHER NUMBER FOUR ABUSED KEVAN AND TEODIS?

A. FROM—EVERY INDICATION I HAVE; FROM INDEPENDENT REPORTS FROM MR. ELLIS,

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MS. JOHNSON, KEVAN, TEODIS, MICHELLE BRUMFIELD, MICHELLE HARRIS, SOME INDICATIONS AND SOME OF THE OFFICIAL REPORTS, STEPFATHER NUMBER FOUR WAS EXCEEDINGLY ABUSIVE. HE WAS A ALCOHOLIC VIETNAM VET AND HE HAD A NUMBER OF METHODS FOR DISCIPLINING THE CHILDREN. YOU KNOW, OF COURSE, I INTERVIEW A LOT OF CRIMINAL PEOPLE, SO YOU INVESTIGATE THESE THINGS PRETTY THOROUGHLY BECAUSE SOMETIMES MY IDEA OF CHILD ABUSE MAY NOT BE SOMEBODY ELSE'S. SO I TALKED WITH EVERYBODY AT LENGTH ABOUT THIS AND INDEPENDENTLY GOT REPORTS FROM EACH OF THESE PEOPLE, VOLUNTARY INFORMATION. I ASK OPEN-ENDED QUESTIONS. I DON'T SAY WAS HE—IS SO AND SO ABUSED. I ASK VERY OPEN QUESTIONS; SUCH AS, TELL ME ABOUT GROWING UP IN YOUR HOME, WHAT WAS IT LIKE WHEN Y'ALL WERE IN ELEMENTARY SCHOOL, THOSE TYPES OF QUESTIONS, AND OF COURSE, YOU HEARD TEODIS'S TESTIMONY AND THAT WAS THE LAST TESTIMONY I HEARD. TEODIS DID VERIFY EARLIER TESTIMONY. EVIDENTLY, STEPFATHER NUMBER FOUR WAS NOT A HAPPY PERSON AND [120]HE OFTEN WOULD PUT THE CHILDREN, THE TWO OLDEST BOYS—AND—AND HE VERGED ON FATHERING THE THIRD GIRL, BUT DID NOT BOTHER HER MUCH. WOULD PUT—HAVE THEM KNEEL IN THE DINING ROOM IN TIN PANS WITH RICE IN IT FOR HOURS SOMETIMES WITH TELEPHONE BOOKS ON THEIR HEADS AND

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WHEN THE TELEPHONE BOOK WOULD FALL OFF, THEN HE WOULD BEAT THEM WITH A—WHAT WAS DESCRIBED TO ME AS BRANCHES; YOU KNOW, WITH THAT TYPE OF DIAMETER, WITH AN INCH IN DIAMETER. AND THAT WAS THE TERM—THAT WAS WHAT CAUGHT—I GUESS REALLY ALARMED ME ABOUT IT BECAUSE USUALLY I DON'T GET SUCH DETAILED REPORTS FROM DIFFERENT SOURCES THAT DON'T TALK TO EACH OTHER. I MEAN, BECAUSE I CAN CHECK THIS STUFF OUT VERY THOROUGHLY AND IT WAS—WE BROUGHT MICHELLE UP FROM NEW ORLEANS AND INTERVIEWED HER AND—NOT ON THAT DATE, BUT ON A SUBSEQUENT PERIOD OF TIME. SHE BASICALLY SAID THE SAME THING. OF COURSE, KEVAN WAS IN PRISON AND HE EVENTUALLY TALKED TO ME ABOUT THAT. THE TIN RICE—THE RICE IN THE TIN PAN WAS A TOTALLY NEW THING FOR ME. I HAD NOT HEARD THAT BEFORE AND I KNEW IT WAS UNUSUAL, BUT SEVERAL PEOPLE THOUGHT BETTER OF ME. WHEN I TRIED TO FIGURE OUT SOME OF THE ANSWERS TO THESE QUESTIONS SUCH AS, YOU KNOW, WHY WAS KEVAN SO ABUSED AS OPPOSED TO SOME OF THE OTHER CHILDREN AND SO FORTH, THEN THAT'S WHEN I WAS WARNED—WAS INFORMED OF THE METHOD. IF STEPFATHER NUMBER FOUR WOULD TRY TO DETERMINE WHO THE GUILTY PARTY WAS OUT OF CHILDREN—AND SO HE WOULD GET A GLASS OF WATER AND HAVE ALL THE CHILDREN PUT THEIR FINGER IN THE WATER AND WHOEVER'S FINGER SHOOK THE

MOST, HE WOULD DETERMINE THAT'S WHO THE LIAR WAS AND THAT'S WHO WOULD GET THE BEATING OR THE DISCIPLINE AND EVIDENTLY IT WAS EITHER KEVAN'S FINGER MOST OF THE TIME, OR HE INDICATED—ALL THE CHILDREN INDICATED THAT KEVAN GOT THE BRUNT OF THE ABUSE OFTENTIMES BECAUSE OF THAT, BECAUSE HIS FINGER SHOOK IN THE WATER.

[121]Q. OKAY. WHAT YOU DESCRIBE AS HIS PROBLEM FROM YOUR REPORTS AND BEGINNING IN THIRD GRADE THE ATTENTION DEFICIT AND NOT BEING ABLE TO STAY IN HIS CHAIR, THE AGGRESSIVE AND DEFIANT BEHAVIOR, IS THAT CONSISTENT WITH YOUR STUDIES ON THE WAY ABUSED CHILDREN ACT IN SCHOOL, ACT OUT?

A. THAT BEHAVIOR CAN BE ACCOUNTED FOR BY SEVERAL FACTORS IN KEVAN'S BACKGROUND. I'VE READ BOXES OF SCHOOL RECORDS AND I CAN ASSURE YOU MOST OF THEM SAY THAT—THAT HE ABSOLUTELY WOULD BECOME OUT OF CONTROL. I MEAN, BY THE TIME HE WAS IN THE FOURTH GRADE, HE WOULD ABSOLUTELY LOSE HIS COMPOSURE TOTALLY IN THE CLASSROOM AND THE—A LOT OF TIMES IT HAD TO DO WITH BEING TEASED. ALL THREE TEACHERS REPORTED THAT. HE—HE COULD NOT STAND IF OTHER CHILDREN WOULD PUT THEIR HANDS ON HIM; LIKE SURPRISE HIM. THEN HE WOULD ACT OUT VERY AGGRESSIVELY AGAINST THAT. HE DID NOT LIKE TO SEE OTHER CHILDREN, YOUNGER CHILDREN HURT OR TEASED. THAT WAS

REPORTED TO ME ALSO. AND I—IN LOOKING AT ALL OF HIS BEHAVIOR, THE UNCONTROLLABLE ACTING OUT, THE AGGRESSIVE PLAY WITH OTHER CHILDREN, THE—I GUESS WHAT WE TERM HYPERVISUALANCE, OR SOMETIMES IN SOME RESEARCH IT'S CALLED FROZEN WATCHFULNESS WHERE YOU'RE CONSTANTLY ON GUARD FOR SOMEBODY TO COME HURT YOU—AND CHILDREN THAT ARE ABUSED OR DO NOT LIVE IN PROTECTIVE ENVIRONMENTS, THAT'S WHAT THEY DO. THEY—IN A CLASSROOM, THEY—THEY—THEY CAN FUNCTION FINE IN A CLASSROOM, I GUESS, IF THAT'S THE ONLY PROBLEM THEY HAVE, BUT WHEN YOU PUT KEVAN'S PROBLEM WITH WHAT WAS GOING ON AT HOME, AND THEN YOU ADD THAT TO THE HYPERACTIVITY, THE LEARNING DISABILITY HE WAS DIAGNOSED WITH, YOU GET TWO FACTORS THAT ALMOST MADE IT IMPOSSIBLE FOR HIM TO BEHAVE IN A CLASSROOM AND, AGAIN, IT WASN'T JUST MISBEHAVIOR, IT WAS—IT WAS OUT OF CONTROL BEHAVIOR.

Q. AND FROM YOUR SEARCHING THROUGH THE RECORDS AND YOUR [122]DISCUSSIONS WITH INDIVIDUALS INVOLVED IN KEVAN'S SCHOOLING, DID YOU FIND OUT WHETHER OR NOT THERE WAS SOME EFFORTS BEING MADE TO PLACE KEVAN IN A SPECIAL CLASS?

A. OF COURSE THAT WAS MY FIRST QUESTION WHEN I STARTED LOOKING INTO THIS, IS HOW—

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YOU KNOW, WHAT KIND OF A CLASSROOM WAS HE IN? THE FIRST TEACHER, THE THIRD GRADE TEACHER, MRS. ARCENEAUX, TOLD ME THAT—AGAIN—THAT SHE KNEW SOMETHING WAS WRONG AND SO SHE STARTED THE PAPERWORK TO GET HIM EVALUATED AND GET HIM TO THE CLASSROOM WHERE HE COULD BE HELPED AND THEN HE WENT TO MS. CROSS' CLASSROOM, FOURTH GRADE, AND MS. CROSS DID THE BEHAVIOR AND—I MEAN, DID DO THE—EXCUSE ME—THE PAPERWORK TO GET THE EVALUATION DONE, AND THOUGHT IT HAD GONE THROUGH AND WHEN HE CAME BACK FROM MS. ARCENEAUX'S FIFTH GRADE CLASS, THE PAPERWORK HAD NOT BEEN DONE AT WHICH TIME, EVIDENTLY, THERE WAS SOME KIND OF PROBLEM WITH THE SCHOOL BOARD WITH THE EVALUATION AND THEY BOTH—BOTH RECORDED THAT THEY WENT TOGETHER TO WHOEVER THEY WERE SUPPOSED TO GO TO TO SAY, LOOK, WE FILED THIS PAPERWORK, SOMETHING IS WRONG WITH THIS CHILD AND WE NEED TO HAVE—HE NEEDS TO BE IN A SPECIAL CLASS. AND HE FINALLY WAS, AT WHICH POINT, IN THE SECOND PART OF FIFTH GRADE HE WAS MOVED TO HARDING ELEMENTARY, WHERE HIS TEACHER WAS TYRONE ALLEN, AND WE SPOKE WITH HIM AS WELL, AS HE BASICALLY REPORTED THE SAME THING ABOUT KEVAN. HE TAUGHT A CLASSROOM WITH SIX BEHAVIOR DISORDER KIDS AND KEVAN WAS THE YOUNGEST AND KIND OF SMALLEST IN THE CLASSROOM AND HE SAID THAT KEVAN

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WAS THE BEST BEHAVED OUT OF ALL SIX OF THEM BUT HE WAS DEFINITELY—I MEAN, HE DIDN'T—HE FIT IN THERE BETTER THAN HE FIT INTO A REGULAR CLASSROOM, BUT HE DIDN'T REALLY FIT INTO THAT CLASSROOM EITHER.

Q. SO THE B.D. CLASS, THE BEHAVIORAL DISORDER CLASS, WAS SMALLER THAN THE REGULAR CLASS?

[123]A. YES.

Q. AND HE SEEM TO IMPROVE? HIS BEHAVIOR SEEMED TO IMPROVE AS MORE CONSTRUCTIVE AND—

A. YEAH. I THINK IT WAS—I'M SORRY. I THINK IT WAS JUST—IT WAS EASIER FOR HIM TO GET THE ONE ON ONE ATTENTION, THAT HE DID WELL WITH IT. HE DID NOT DO WELL IN LARGE GROUPS. HE DID POORLY AT RECESS. HE COULD NOT FUNCTION WITH A LOT OF CHAOS.

Q. DID YOU HAVE INFORMATION REGARDING WHETHER OR NOT KEVAN WAS REFERRED TO MARGARET DUMAS MENTAL HEALTH CENTER?

A. HE WAS REFERRED TO—HIS—HIS REFERRAL TO MARGARET DUMAS WAS THROUGH THE SCHOOL SYSTEM AND I BELIEVE HIS FIRST REFERRAL THERE WAS IN 1983, 1984.

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Q. DO YOU HAVE INFORMATION REGARDING WHETHER OR NOT HE WAS PRESCRIBED ANY MEDICATION TO SORT OF CONTROL HIS BEHAVIOR?

A. HE WAS FIRST REFERRED TO MARGARET DUMAS IN 1983 AT THE AGE OF TEN YEARS OLD. HE ATTENDED SEVERAL COUNSELING SESSIONS AND WAS EVALUATED THERE. AT THAT TIME HE WAS PLACED ON MELLARIL, WHICH I UNDERSTAND IS A ANTIPSYCHOTIC DRUG, FOR A SHORT PERIOD OF TIME. HE WAS DIAGNOSED IN 1983, AND YOU'LL HAVE TO FOLLOW THIS UP WITH THE NEUROPSYCHOLOGIST, WITH ADJUSTMENT DISORDER. THAT WAS THE SAME TIME THAT HE WAS REFERRED TO THE SCHOOL BOARD FOR THE EVALUATION AND HE WAS CLASSIFIED AS BEHAVIOR DISORDER. HE WAS THEN REFERRED BACK TO MARGARET DUMAS IN 1984 AND THIS TIME, YOU KNOW, THE SPECIFIC COMMENTS ON THE PSYCHOLOGICAL REPORT WAS THAT THEY FUNCTIONED—THEY QUESTIONED HIS INTELLECTUAL FUNCTIONS. THEY FELT THAT HE HAD A LEARNING DISABILITY. THEY RECOGNIZED THE FACT THAT HE PROBABLY HAD A LEARNING DISABILITY RELATED TO SOME TYPE OF SLOWNESS IN MOTOR DEVELOPMENT, SOME TYPE OF PHYSIOLOGICAL—

Q. WAS THAT THE FIRST TIME THAT ANYONE HAD DETECTED—[124]WELL, ANY SCHOOL—ANY SCHOOL RELATED PERSONNEL HAD DETECTED ANY NEUROTIC OR NEUROLOGICAL PROBLEMS?

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A. CORRECT. WHEN HE WAS DIAGNOSED WITH BEHAVIOR DISORDERS, WE GOT A COPY OF THAT DEFINITION FROM THE SCHOOL BOARD TO TRY TO GET AN UNDERSTANDING OF WHAT THEY FELT LIKE HIS PROBLEM WAS AND THE BEHAVIOR DISORDER IS DEFINED AS A PATTERN SITUATION OR INAPPROPRIATE BEHAVIOR EXTENDED OVER A LONG PERIOD OF TIME WHICH CANNOT BE EXPLAINED BY INTELLECTUAL, SENSORY, NEUROLOGICAL OR OTHER GENERAL FACTORS, SO HE'S DIAGNOSED WITH A STRICT BEHAVIORAL PROBLEM, DIAGNOSED LATE, AND PROBABLY DIAGNOSED INCORRECTLY SINCE HE OBVIOUSLY DID HAVE—OR AS I FOUND OUT LATER, LOOKING THROUGH ALL THE RECORDS, HE OBVIOUSLY DID HAVE A PHYSIOLOGICALLY LINKED LEARNING DISABILITY THAT HE WAS BORN WITH.

Q. WHEN HE WAS IN MARGARET DUMAS MENTAL HEALTH FACILITY DID THEY SO-TO-SPEAK GUINEA PIG HIM WITH ANY MEDICATION? COULD YOU EXPLAIN THAT?

A. YEAH. HIS BEHAVIOR WAS—TURN BACK TO THAT PART. EVIDENTLY THEY WERE TRYING TO MODERATE HIS BEHAVIOR WITH MEDICATION AND THE PSYCHIATRIST THAT WORKED FOR INDEPENDENCE HOME, CONNECTED WITH MARGARET DUMAS, PUT HIM ON A TRIAL OF MEDICATIONS TO SEE WHICH ONES WORKED BEST. LET ME TRY TO REMEMBER WHAT HE

SAID. IT'S SOMEWHERE IN THESE RECORDS. BASICALLY THEY PUT HIM ON A TRIAL OF MELLARIL WITH ARTANE AND ANOTHER DRUG AND HE TRIED TO FIND OUT IF HIS BEHAVIOR IMPROVED WITH ONE OR THE OTHER AND WITH ONE DRUG BY ITSELF—WITH MELLARIL BY ITSELF, HIS BEHAVIOR WAS FIFTY-SIX PERCENT WORSE, OR SOMETHING TO THAT REGARD. WITH TWO—HIS BEHAVIOR WAS WORSE WITH TWO OF THE DRUGS. AND FINALLY, BY TRYING ALL THESE COMBINATION OF DRUGS WITH HIS BEHAVIOR, THEY FINALLY TOOK HIM OFF ALL THE MEDICATIONS AND DECIDED HE DID BEST WITHOUT ANY. IN FACT, THEY HAVE A NEGATIVE EFFECT ON [125]HIM.

Q. WAS THAT AT OR ABOUT THE TIME OF KEVAN'S FIRST OUT-OF-THE-HOME PLACEMENT?

A. THAT WAS KEVAN'S FIRST OUT-OF-THE-HOME PLACEMENT. HE WAS PLACED IN INDEPENDENCE HOME.

Q. WERE YOU ABLE TO GET ANY RECORDS—WELL, THAT WAS—WELL, THAT WAS—

A. YES. WE HAVE RECORDS FROM INDEPENDENCE HOME.

Q. HOW DID HE DO OVER THERE?

A. HIS BEHAVIOR WAS VERY DISRUPTIVE IN THAT HOME AS WELL. HE—IT WAS ALMOST EXACTLY

WHAT HAD BEEN RECORDED AT SCHOOL. HE WOULD DO REAL WELL, ONE ON ONE, WHEN HE WAS IN A STRUCTURED ENVIRONMENT WHERE SOMEBODY WOULD PAY ATTENTION TO HIM AND HELP HIM FUNCTION. BUT ONCE HE WAS PUT WITH A GROUP OF OTHER KIDS, ESPECIALLY A GROUP OF EMOTIONALLY DISTURBED KIDS, HE DID NOT DO WELL. SO IT WAS UP, DOWN, UP, DOWN ALL THE TIME.

Q. SO HE WAS PLACED BACK IN HIS PARENTS' HOME?

A. HE HAD BEEN GOING BACK TO HIS PARENTS' HOME ON THE WEEKEND. AT INDEPENDENCE HOME THEY WOULD LET THE CHILDREN GO ON THE WEEKENDS AND SO HE WAS GOING BACK THERE ON THE WEEK—ON THE WEEKENDS. AT THE SAME TIME STEPFATHER NUMBER FOUR WAS STILL THERE. SO IT WAS REALLY HARD TO TELL BETWEEN THE MEDICATIONS, THE PROBLEM WITH HIS STEPFATHER, THE—THE MISDIAGNOSED LEARNING PROBLEMS. THEN WE HAVE NOW COME TO UNDERSTAND AT LEAST WHAT THEY ARE. BUT WITH ALL OF THOSE THINGS GOING ON YOU REALLY COULDN'T PINPOINT WHAT WAS ONE CAUSE OR WHAT WAS THE OTHER. IT WAS MORE A COMBINATION. THERE WERE SO MANY THINGS THAT WERE NEGATIVE OR THERE WERE SO MANY THINGS IN HIS LIFE THAT DIDN'T WORK AND I COULDN'T SAY IT WAS JUST ONE THING.

IT WAS MANY THINGS. THERE WAS A LOT OF INDICATION IN THE DAILY PROGRESS RECORDS THAT IF HE HAD A [126]BAD PHONE CALL FROM HOME, HE HAD—HIS BEHAVIOR, A LOT OF TIMES, WAS LINKED WITH HIS MOTHER'S BEHAVIOR. IF HIS MOTHER WAS IRRITATED WITH HIM, HE WOULD ACT VERY BADLY AT THE GROUP HOME AND THAT FOLLOWED THROUGH ALL OF HIS HOME PLACEMENTS. FOR THE MOST PART, HE WAS ALWAYS LIKE THAT.

Q. WAS HE PERMANENTLY PLACED BACK IN THE HOME FROM—HIS—HIS PARENTS HOME, FROM INDEPENDENCE HOME AT SOME POINT?

A. NO. HE WENT—AFTER THE FIFTH GRADE, HIS HISTORY BECOMES VERY INTERESTING. HE WENT FROM INDEPENDENCE HOME TO GREENWELL SPRINGS HOSPITAL.

Q. WHILE AT GREENWELL SPRINGS—AND WE'LL GET BACK TO THE—OUR HOME PLACEMENTS LATER—BUT WHILE AT GREENWELL SPRINGS DO YOU KNOW WHAT KIND OF MEDICATION THEY HAD HIM ON?

A. HE WAS PLACED ON THORAZINE AT GREENWELL SPRINGS.

Q. IS THAT A TRANQUILIZER?

A. I'M—I'M—I COULDN'T BE SURE. MY UNDERSTANDING IS THAT IT'S ANOTHER ANTIPSYCHOTIC DRUG.

MS. BURNS: JUDGE, I'M GOING TO OBJECT TO THE ANSWER. SHE STATED SHE COULDN'T ANSWER IT.

THE COURT: SUSTAINED.

BY MR. BROWN:

Q. WAS HE PLACED ON ANY OTHER MEDICATION?

A. HE WAS PLACED ON ANOTHER DRUG, VISTARIL, WHICH I'M NOT FAMILIAR WITH EITHER.

Q. YOU—YOU WERE ABOUT TO GO INTO HIS OUT-OF-HOME PLACEMENTS FROM INDEPENDENCE HOME TO GREENWELL—

A. SPRINGS. HE WOULD GO BACK HOME FOR A WHILE, ENTER ANOTHER SCHOOL. AT THAT TIME HE REENTERED ZION CITY, I BELIEVE. HE WENT TO REYNOLDS INSTITUTE, WHICH IS THE HOME IN PONCHATOULA THAT HIS MOM REFERRED TO. HE WAS IN CHRISTIAN ACRES UP IN TALLULAH, BATON ROUGE—B.R.M.I., BATON ROUGE MARINE INSTITUTE HERE FOR A VERY BRIEF PERIOD OF TIME. IN [127]ALL, HE HAD SIX OUT-OF-HOME PLACEMENTS AFTER THE AGE OF TWELVE.

Q. WHAT WAS HIS FIRST INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM?

A. HIS INITIAL INVOLVEMENT WAS IN 1987 FOR AN UNGOVERNABLE CHARGE AND THAT—THAT'S A STATUS OFFENSE. THAT MEANS HE WAS HAVING TROUBLE AT HOME.

Q. DO YOU KNOW WHETHER OR NOT—IN REGARD TO THE ABUSE—WHETHER OR NOT KEVAN MADE ANY CALLS TO STATE AGENCIES IN ORDER TO TRY TO FIND ASSISTANCE FOR HIS HOME SITUATION?

A. KEVAN REPORTED TO ME—WELL, ALL THE CHILDREN THAT I SPOKE TO REPORTED THAT THEY DID NOT DISCUSS THE ABUSIVE SITUATION MUCH OUTSIDE THE HOME. I KNOW—I KNOW THEY DIDN'T DISCUSS IT MUCH WITH THEIR FATHER BECAUSE—BECAUSE I KNEW MORE THAN HE DID ABOUT HIS SITUATION, FOR ONE THING, AND I THINK THAT—I THINK THEY—THEY NEVER WERE VERY HAPPY THAT THEIR PARENTS WEREN'T TOGETHER; TEODIS AND KEVAN IN PARTICULAR, AND I DON'T THINK THEY TALKED TO EACH PARENT. LIKE THEY DIDN'T TALK TO MR. ELLIS ABOUT PROBLEMS WITH MRS. BRUMFIELD AND THEY DIDN'T TALK TO MRS. BRUMFIELD ABOUT PROBLEMS WITH MR. ELLIS. I JUST DON'T THINK THEY TALKED ABOUT IT AT ALL. KEVAN KEPT REPORTING TO ME THAT HE CONTACTED—HE CALLED CHILD

ABUSE AND NEGLECT HIMSELF, WHICH HE COULD HAVE DONE BECAUSE THERE WAS A HOTLINE HERE AT THAT TIME, AND THOSE RECORDS—IT'S ILLEGAL FOR THAT AGENCY TO GIVE THOSE RECORDS TO US, SO I COULDN'T FOLLOW IT UP WITH THEM. HOWEVER, I DID SPEAK TO MS. BRUMFIELD ABOUT IT AND SHE DID VERIFY THAT THEY HAD BEEN OUT THERE INVESTIGATING REPORTS OF CHILD ABUSE IN THE HOME.

Q. DR. GUIN, YOU SPEAK IN YOUR SOCIAL HISTORY OF KEY POINTS IN KEVAN'S DEVELOPMENTAL HISTORY. COULD YOU GO OVER THAT FOR THE JURY, FOR US?

[128]A. OKAY. BASICALLY, WITH ALL THESE RECORDS AND INTERVIEWS AND TRYING TO PUT ALL THIS TOGETHER IN SOME TOPOLOGICAL FRAMEWORK, I THINK THE POINTS THAT STOOD OUT TO ME IN TERMS OF EXPLAINING HOW KEVAN BECAME THE PERSON THAT HE HAS BECOME BEGAN WITH THE LOW BIRTH WEIGHT. WE CAN'T GET AROUND THAT. THAT'S A FACTOR. CHILDREN THAT ARE BORN AT THREE POINT FIVE POUNDS ARE DAMAGED. IF THAT'S THE ONLY PROBLEM A CHILD HAS, WITH SUPPORTIVE PARENTS THEY CAN GET THROUGH THEIR MEDICAL CARE. HIS LOW BIRTH WEIGHT STATUS WAS—THE RESULTS OF THAT WERE PROBABLY COMPOUNDED BY THE FACT THAT HE REALLY DID NOT HAVE A SUPPORTIVE OR PROTECTIVE

HOME ENVIRONMENT. I DON'T WANT THAT TO BE MISCONSTRUED AS A CRITICISM OF HIS MOTHER OR HIS FATHER, NECESSARILY. IN SPEAKING TO THE TEACHERS, I KNOW THAT MS. BRUMFIELD PROBABLY DID THE VERY BEST THAT SHE COULD, GIVEN THE CIRCUMSTANCES, AND I BELIEVE THAT. I KNOW THAT SHE WAS FROM A DOMESTIC VIOLENCE—EXCUSE ME—A FAMILY VIOLENT HOME HERSELF AND I THINK THAT AFFECTED HER BEHAVIOR WITH THE CHI REN. THE SCHOOL TEACHERS INDICATED TO ME THAT THE CHILDREN WERE IN SCHOOL AND SHE TRIED HER BEST TO KNOW WHAT TO DO WITH THEM. SHE REALLY DID. AND THE SAME WITH MR. ELLIS; THAT HE—YOU KNOW, IT WASN'T THAT HE DIDN'T LOVE THEM. I DON'T—I DON'T THINK IT SHOULD BE CONSIDERED THAT WAY. I THINK—I REALLY FEEL THAT HE DOES LOVE HIS BOYS, HE JUST WASN'T THERE. AND AFTER—I DON'T THINK IT WAS NECESSARILY THROUGH ANY CHOICE OF HIS OWN, BUT HE WASN'T THERE AND HE WAS THERE EARLIER BUT WAS NOT THERE LATER IN THEIR LIFE WHEN THE PROBLEMS WITH STEPFATHER NUMBER FOUR CAME UP. IN LOOKING AT THE THREE PSYCHOLOGICALS THAT WE HAVE ON KEVAN NOW, WE KNOW THAT HE ALWAYS HAD SOME TYPE OF NEUROLOGICALLY BASED HYPERACTIVE OR LEARNING DISABILITY PROBLEM AND THE DOCTOR THAT FOLLOWS ME CAN DISCUSS THAT. SO WE KNOW THAT THAT WAS WHAT WAS GOING ON [129]AND,

UNFORTUNATELY, THAT WAS NOT DIAGNOSED AND IT PROBABLY HAD A LOT TO DO WITH THE TIME. YOU KNOW, THINGS ARE DIFFERENT NOW THAN THEY WERE BACK IN 1978. NONETHELESS, IT IS AN OBJECTIVE EXPLANATION. HE DID HAVE HIS LIMITATIONS. THERE'S NO DOUBT. FROM INTERVIEWING—FROM MY TELEPHONE INTERVIEW WITH THE NEUROPSYCHOLOGIST AND FROM READING HIS REPORT, KEVAN'S BASIC PROBLEM WAS THAT HE—HE COULD NOT PROCESS INFORMATION. WHEN IT CAME—WHEN HE RECEIVED INFORMATION, HIS MIND DID SOMETHING A LITTLE DIFFERENTLY WITH IT THAN MY MIND WOULD AND YOUR MIND WOULD. YOU ADD THAT TO THE CHILD ABUSE IN THE HOME AND I DO BELIEVE THE CHILDREN WERE BRUTALIZED. GO ON TO THE SCHOOL ASSESSMENT, THE FIASCO WITH THE SCHOOL ASSESSMENT. YOU KNOW, THE TEACHERS KNOW SOMETHING'S WRONG WITH HIM BUT CAN'T GET THE HELP FOR HIM THAT'S NEEDED AND THEN SIX OUT-OF-HOME PLACEMENTS, SIX FATHER FIGURES, FOURTEEN TO FIFTEEN SCHOOLS BY THE TIME HE WAS FOURTEEN YEARS. I MEAN, THAT'S—THOSE ARE THE KEY POINTS IN HIS DEVELOPMENT. THAT IS HOW KEVAN WAS DEVELOPED.

Q. DID YOU SPEAK ABOUT THE CRIMINALOGICAL FACTORS?

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A. A LOT OF THE—BECAUSE I'M INVOLVED WITH CRIMINAL JUSTICE, A LOT OF THE THINGS THAT I LOOK AT ARE FACTORS THAT ARE PARTICULARLY RELATED TO THE DEVELOPMENT OF A CRIMINAL LIFESTYLE, SO I LOOK AT MAINLY—AS I'VE TALKED ABOUT, I LOOK AT SOCIAL FACTORS; THINGS LIKE POVERTY, AND WHAT KIND OF ENVIRONMENT A CHILD IS IN, AND, AGAIN, THE SOCIAL FACTORS THAT WERE MOST IMPORTANT IN HIS LIFE WERE THE SIX FATHER FIGURES IN AND OUT OF THE HOME, THE FIVE PLACEMENTS, THE FIFTEEN SCHOOLS, THE TYPE OF ENVIRONMENT IN WHICH HE LIVED. THE HOME WAS CHAOTIC. HIS EARLY LIFE; FIRST FOUR YEARS, FIVE YEARS, SEEMED TO BE OKAY. HE WAS LUCKY. HE HAD GRANDPARENTS. I MEAN, HE HAD GRANDMOTHERS, I SHOULD SAY. HE DID HAVE THAT EARLIER. HE DID NOT HAVE THAT LATER. FAMILY [130]FACTORS THAT WE LOOKED AT IN TERMS OF THE DEVELOPMENT OF CRIMINAL BEHAVIOR; HERE WE LOOK AT HOW CHILDREN ARE SOCIALIZED. HE—HE—BOTH—WELL, KEVAN WAS NOT WELL SOCIALIZED. WHEN I INTERVIEWED THE MOTHER OF TWO OF HIS CHILDREN—WHO I DID THINK WAS A VERY GOOD INFLUENCE ON HIM —SHE TOLD ME THAT SHE AND HER MOM TOOK MORE CARE OF KEVAN LATER IN HIS LIFE THAN HIS OWN MOTHER DID, AND, OF COURSE, I REALIZE AT THIS POINT MS. BRUMFIELD WAS PROBABLY—YOU KNOW—NO LONGER KNEW WHAT TO DO AND I REALLY BELIEVE THAT'S

CORRECT. BUT OUT OF, YOU KNOW, THE OTHER PERSON I INTERVIEWED, MICHELLE HARRIS, SHE SAID THEY SIMPLY HAD NO—THERE WAS NO MODELING IN THE HOME. THERE WASN'T ANYBODY TO TEACH ANYBODY HOW TO BEHAVE. I THINK WITH THIS FAMILY A LOT OF PEOPLE KNEW WHAT THEY WERE SUPPOSED TO DO, THEY SIMPLY DIDN'T KNOW HOW TO FOLLOW THROUGH ON IT. THROUGHOUT THE ENTIRE FAMILY HISTORY YOU SEE RECIPROCAL EFFECTS OF ABUSE AND NEGLECT. THE MOTHER WAS RAISED IN ABUSIVE SITUATIONS AND A LOT OF THOSE EFFECTS WERE PASSED ON TO THE CHILDREN. CHILDREN THAT ARE ABUSED REMAIN EMOTIONALLY DETACHED FROM OTHER PEOPLE. THEY CANNOT CONNECT ON AN EMOTIONAL LEVEL. IF YOU'VE EVER BEEN AROUND A ABUSED CHILD, YOU KNOW THAT. THEY SIMPLY ARE NOT ABLE TO MAKE THAT CONNECTION. AND THAT WAS PASSED ON TO THESE CHILDREN. THE LACK OF ROLE MODELS. I DO THINK THAT THURMOND—MR. ELLIS BECAME A GOOD ROLE MODEL FOR HIS SON LATER ON IN LIFE. I DON'T—WELL, I MEAN, HE WOULD TELL YOU THIS HIMSELF. I DON'T THINK HE WAS NECESSARILY STABLE, AS HE WOULD HAVE LIKED TO HAVE BEEN DURING THOSE EARLY YEARS. THE EDUCATION FACTORS THAT RELATED TO THE DEVELOPMENT OF CRIMINAL BEHAVIOR WE'VE BEEN THROUGH, THE INTELLECTUAL PROBLEMS, BEING TEASED AT SCHOOL ALL THE TIME AS A RESULT OF

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BEING DIFFERENT, AGGRESSIVE BEHAVIOR, IMPAIRED IMPULSE CONTROL, ARE VERY TRADITIONAL AND THEORETICALLY [131] ACCEPTED SYMPTOMS OF CHILD ABUSE AND NEGLECT AND NEUROLOGICALLY BASED PROBLEMS. I THINK, REALLY, THE BIGGEST FACTOR WITH HIS EDUCATIONAL DEVELOPMENT WAS THE FACT THAT HE WAS IN FOURTEEN TO FIFTEEN SCHOOLS AND HE WAS DISCHARGED FROM THE EAST BATON ROUGE PARISH SCHOOL SYSTEM AT THE END OF THE NINETH GRADE. SO THAT'S VERY REMARKABLE. PSYCHOLOGICAL FACTORS. AGAIN, I'VE BEEN THROUGH THOSE. EVIDENCE OF PSYCHOLOGICAL PROBLEMS WERE THERE EARLY AND THEY WERE DIAGNOSED REPEATEDLY AT EACH OF THESE DIFFERENT FACILITIES. UNFORTUNATELY, HIS REAL PROBLEM WAS PROBABLY NOT DIAGNOSED UNTIL WE STARTED—HIS REAL PROBLEM WAS DIAGNOSED—

Q. BY REAL PROBLEM, WHAT ARE YOU REFERRING TO?

A. THE FACT THAT IT HAD—THAT THERE WAS SOME KIND OF NEUROLOGICAL PROBLEM THAT HE HAD; THAT HE DID NOT PROCESS INFORMATION CORRECTLY, UNDER THE BEST CONDITIONS HE COULD NOT SIT IN THE CLASSROOM, THAT HE DID HAVE CHILD ABUSE, THAT HE HAD NO ONE SET OF PARENTS. HE WOULD NOT HAVE BEEN ABLE TO FUNCTION IN

THE CLASSROOM. AND THAT STARTED COMING OUT AT MARGARET DUMAS, EVENTUALLY.

Q. DID YOU OBTAIN DISCIPLINE REPORTS OF KEVAN WHILE HE'S BEEN IN THE PARISH PRISON?

A. I DID. I HAVE A SUMMARY OF DISCIPLINARY REPORTS FOR THE LAST TWO AND A HALF YEARS THAT HE WAS IN EAST BATON ROUGE PARISH.

Q. FROM THE DAY HE'S BEEN ARRESTED ON THIS MATTER—

A. CORRECT.

Q. —WHERE WE ARE TO THIS POINT?

A. AND I HAVE THEM SUMMARIZED HERE. THE FIRST TWELVE MONTHS THAT HE WAS IN PARISH PRISON—HE ENTERED SOMETIME—GOT INTO THE PRISON SOMETIME EARLY FEBRUARY OF 1993—HE HAD SEVEN DISCIPLINARY REPORTS RANGING ANYWHERE FROM SMOKING A CIGARETTE TO AGGRAVATED DISOBEDIENCE, PARTICIPATING WITH [132]OTHER INMATES BEATING ON WALLS, THINGS LIKE THAT. THE SECOND TWELVE MONTHS HE WAS THERE, THE SECOND TWELVE-MONTH PERIOD HE HAD FOUR DISCIPLINARY REPORTS RANGING FROM STEALING—ACCUSED BY AN INMATE OF

STEALING SOMETHING, HE HAD A CIGARETTE ONE TIME, GOT IN A FIGHT WITH ANOTHER INMATE, GOT INTO AN ALTERCATION WITH A DEPUTY OVER A BALL OF SOAP. THE LAST SIX MONTHS SINCE HE'S BEEN THERE HE'S HAD TWO DISCIPLINARY REPORTS. ONE INVOLVED—I COULDN'T REALLY TELL WHAT THIS WAS; SOME TYPE OF ALTERCATION WITH A DEPUTY. I DON'T KNOW WHAT THAT MEANT. HE WASN'T FOUND GUILTY OR HE WAS NOT—HE WAS NOT PUT IN WHAT THEY CALL THE TANK. SO I DON'T KNOW. AND THEN HIS LAST ONE WAS IN MAY. HE WAS CHARGED WITH DISOBEDIENCE BECAUSE HE WOULD NOT ALLOW FOR A STRIP SEARCH OF HIS BODY.

Q. SO YOUR EXAMINATION OF THOSE DISCIPLINE REPORTS CITE A DECREASING NUMBER OF INCIDENTS?

A. RIGHT. YES. IT'S—YEAH. GOING BACK TO WHAT THE SCHOOL TEACHERS TOLD ME, BECAUSE EVERYTHING ALWAYS SEEMS CONSISTENT WITH THE WAY THEY DESCRIBED THINGS AND IT'S THE SAME WITHIN THE PRISON SYSTEM. WHEN IT'S—WHEN HE'S IN A LARGE GROUP, IF IT'S LOTS OF PEOPLE, LOTS OF CHAOS, HE DOESN'T DO WELL. BUT IF YOU LEAVE HIM ALONE, PUT HIM IN A, YOU KNOW, A STRUCTURE WITH A CONTROLLED ENVIRONMENT, THEN HE DOES MUCH BETTER.

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Q. IN YOUR EXPERT OPINION, CAN KEVAN BRUMFIELD ADEQUATELY FUNCTION IN A STRUCTURED ENVIRONMENT SUCH AS PRISON?

MS. BURNS: I WOULD CERTAINLY OBJECT, YOUR HONOR.

THE COURT: SUSTAINED.

MR. BROWN: THAT'S ALL I HAVE FROM DR. GUIN, YOUR HONOR.

THE COURT: TAKE A SHORT BREAK BEFORE YOU [133]START YOUR CROSS, MS. BURNS. WE'LL TAKE A FIFTEEN MINUTE RECESS, LADIES AND GENTLEMEN. YOU'RE AGAIN ADMONISHED NOT TO DISCUSS ANY OF THE TESTIMONY AMONGST YOURSELVES OR WITH ANYONE ELSE. MR. KING, WOULD YOU GO ON AND RETIRE THE JURY, PLEASE?

REPORTER'S NOTE: AT 2:45 P.M. THE JURY WAS RETIRED TO THE JURY ROOM AND THE ACCUSED WAS REMANDED TO THE CUSTODY OF THE SHERIFF OF EAST BATON ROUGE PARISH. AT 3:10 P.M. THE MATTER WAS RESUMED WITH THE ACCUSED BEING PRESENT IN COURT REPRESENTED BY COUNSEL, ED GREENLEE AND TYRONE BROWN, AND THE STATE BEING REPRESENTED BY ASSISTANT DISTRICT ATTORNEY PREM BURNS.

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THE COURT: THE STATE AND DEFENSE READY?

MS. BURNS: YES, YOUR HONOR.

MR. BROWN: YES, YOUR HONOR.

THE COURT: ALL RIGHT. BRING THEM IN, PLEASE.

REPORTER'S NOTE: AT THIS TIME THE JURY WAS RETURNED TO THE COURTROOM.

MS. BURNS: THE STATE WAIVES THE POLLING OF THE JURY, YOUR HONOR.

MR. BROWN: DEFENSE WAIVES.

THE COURT: ALL RIGHT.

CROSS-EXAMINATION

BY MS. BURNS:

Q. DR. GUIN, I'D LIKE TO DIRECT YOU TO PAGE 25 OF YOUR REPORT THAT YOU PREPARED IN CONNECTION WITH THIS CASE IN WHICH YOU STATE, IN SUMMARY, KEVAN'S CRIMINAL HISTORY IS NOT VERY LENGTHY OR COMPLICATED. AND IN THAT DISCUSSION YOU REFER TO A 1989 INCIDENT THAT WAS NOT MENTIONED BY THE DEFENSE. WOULD YOU DISCUSS THAT WITH US, PLEASE?

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MR. BROWN: YOUR HONOR, CAN WE APPROACH?

THE COURT: YES.

REPORTER'S NOTE: AT THIS TIME BOTH COUNSEL FOR THE ACCUSED AND COUNSEL FOR THE STATE APPROACH THE BENCH FOR A CONFERENCE WITH THE COURT OUT OF THE HEARING OF THE JURY.

MR. BROWN: YOUR HONOR, SHE IS GOING TO GO INTO A 1989 INCIDENT WHICH INVOLVED A SHOOTING. THAT WAS SOMEONE IN A DRUG DEAL, WHICH KEVAN WAS ARRESTED AND CONSEQUENTLY RELEASED. SUCH CRIMES EVIDENCE, YOUR HONOR, I AM GOING TO OBJECT TO THE STATE BEING ALLOWED TO GO INTO THAT. WE AREN'T GOING TO INTRODUCE EVIDENCE REGARDING THAT AND IT WASN'T INTRODUCED ON DIRECT EXAMINATION OF DR. GUIN.

MS. BURNS: SHE DID GO INTO THE FACT THERE WAS A CRIMINAL HISTORY AND 1989 MENTIONED IT—DR. GUIN GLOSSED OVER THE FORMAL PART OF THE HISTORY AND TRIED TO PRESENT BITS AND PIECES, GIVING A FALSE IMPRESSION TO THE JURY.

THE COURT: THIS IS AN EXPERT THAT YOU HAVE ELICITED OPINIONS FROM AND THIS

IS PART OF—I ASSUME THAT THERE IS A BASIS FOR THIS. SHE IS ENTITLED TO GO INTO IT ON CROSS-EXAMINATION.

[135]MR. BROWN: I DISAGREE.

THE COURT: I WILL NOTE YOUR OBJECTION. IT'S OVERRULED.

REPORTER'S NOTE: THIS MATTER RESUMED AS FOLLOWS WITH ALL PARTIES REMAINING PRESENT IN COURT.

BY MS. BURNS:

Q. DR. GUIN, WHEN YOU WERE QUESTIONED BY THE DEFENSE YOU MENTIONED THAT HIS CONTACT WITH THE CRIMINAL SYSTEM STARTED IN 1987 AND THERE WAS NO FURTHER MENTION OF ANY OTHER INCIDENTS, BUT I WOULD LIKE YOU TO DISCUSS WITH THE JURY THIS 1989 INCIDENT NOW.

A. IN 1989 WHEN KEVAN WAS SIXTEEN YEARS OLD, HE WAS INVOLVED IN SOME TYPE OF INCIDENT IN A HOUSING PROJECT AND I HAVE HEARD OF DIFFERENT ACCOUNTS OF IT AND READ OF DIFFERENT THINGS AND COULD NOT REALLY PIECE TOGETHER WHAT HAPPENED.

Q. WAS SOMEONE MURDERED IN THAT INCIDENT?

A. YES. THERE WAS A DRUG DEAL GONE BAD AND SOMEBODY WAS MURDERED.

Q. WHAT DID HE TELL YOU HIS INVOLVEMENT WAS IN THIS INCIDENT?

A. THAT HE HAD WITNESSED A MURDER AND HE HAD TURNED STATE'S EVIDENCE AGAINST A PERSON.

Q. THAT WAS WHAT HE TOLD YOU?

A. CORRECT.

Q. ARE YOU AWARE AND HAVE YOU CONSIDERED AS PART OF YOUR EXPERT CONCLUSIONS THE REPORT OF DR. BRYAN T. JORDAN, A PH.D.?

A. I HAVE.

Q. AND I WOULD REFER YOU TO PAGE 2 OF THAT REPORT, THE NEXT TO THE FINAL PARAGRAPH IN WHICH APPARENTLY THIS DEFENDANT TOLD DR. JORDAN THAT HIS INTERVIEW WITH MR. [136]BRUMFIELD BROUGHT OUT THE ADMISSION THAT HE IN FACT—MR. BRUMFIELD—DID SHOOT AT A DRUG USER WHO HAD REFUSED TO PAY AND DROVE AWAY IN HIS CAR.

A. THAT IS ONE OF THE CONFLICTING REPORTS THAT I READ.

Q. I'M GOING TO ASK YOU IF MR. BRUMFIELD MENTIONED TO YOU THE DECEMBER 25TH OF 1992 CLINTON, LOUISIANA ARMED ROBBERY OF ANTHONY MILLER WHEN YOU DISCUSSED HIS FULL HISTORY BECAUSE I DO NOT NOTICE THAT INCIDENT IN YOUR REPORT.

A. IT SHOULD BE RIGHT AT THE END OF MY REPORT. YES. IT'S RIGHT HERE ON PAGE 24. ALTHOUGH OFFICIAL LEGAL RECORDS OF HIS ADULT CRIMINAL HISTORY WERE NOT AVAILABLE TO ME FOR THE CURRENT REPORT, KEVAN REPORTED TO ME THAT HE WAS FACING CHARGES FOR AN ARMED ROBBERY THAT OCCURRED DURING A DRUG DEAL.

Q. ALL RIGHT. THAT'S WHAT YOU'RE REFERRING TO, BUT—

A. CORRECT.

Q. —YOU DO NOT KNOW THAT—YOU DIDN'T HEAR THE TESTIMONY OF MR. MILLER?

A. THAT'S RIGHT. I DIDN'T.

Q. SO YOU DON'T—AND ARE YOU AWARE THAT HE'S BEEN CONVICTED OF THE CRIME OF ARMED ROBBERY IN CONNECTION WITH THIS CHARGE?

A. NO.

Q. AND ARE YOU AWARE OF THE FACT THAT HE ACTUALLY PLACED A GUN TO THE HEAD OF THIS VICTIM AND PULLED THE TRIGGER?

A. NO.

Q. I WILL ASK YOU IF YOU HAVE FACTORED INTO YOUR CONCLUSIONS A JANUARY 2ND OF 1993 ARMED ROBBERY OF A WOMAN BY THE NAME OF EDNA PERRY WHO WAS ROBBED BY THIS DEFENDANT WITH A SAWED-OFF SHOTGUN.

A. MY UNDERSTANDING WAS THAT HE WAS CHARGED WITH ANOTHER ROBBERY AND I DID NOT KNOW THE PARTICULARS. OF COURSE, I [137] DON'T HAVE THE OFFICIAL RECORDS.

Q. SO YOU HAVE NOT INTERVIEWED MS. PERRY OR MR. MILLER, THE TWO VICTIMS OF THESE CRIMES?

A. NO.

Q. AND YOU REFERRED ALSO TO SOME DISCIPLINARY PROBLEMS THAT HAVE OCCURRED IN THE PARISH PRISON?

A. CORRECT.

Q. ARE YOU AWARE THAT HE HAS BEEN CONVICTED SINCE HIS INCARCERATION IN PRISON FOR THIS OFFENSE OF A BATTERY OF A POLICE OFFICER?

A. WHILE HE WAS IN PRISON?

Q. YES, MA'AM.

A. WELL, I HAVE THE OFFICIAL RECORDS FROM THE PARISH PRISON AND THEY DIDN'T RELEASE THEM TO ME.

Q. AND MR. BRUMFIELD, I PRESUME, DID NOT TALK TO YOU ABOUT THIS EITHER?

A. LET'S SEE. WHAT WAS THE DATE OF THIS? CAN I TAKE IT OUT?

Q. YES, MA'AM.

A. I'D LIKE TO COMPARE THAT WITH THE RECORDS THEY SENT ME. DO YOU HAVE A DATE THAT THIS OCCURRED?

Q. IT'S ON THE FACE OF THE BILL OF INFORMATION, MA'AM. THE CRIME OCCURRED ON OCTOBER 5TH OF 1993. THOSE ARE CERTIFIED COURT RECORDS.

A. THAT REPORT WAS NOT TURNED OVER TO ME BY THE PARISH PRISON.

MS. BURNS: AT THIS TIME, YOUR HONOR, THE STATE WOULD MOVE TO FILE INTO THE COURT RECORD AS STATE-EXHIBIT NUMBER 5 THE DOCUMENT IDENTIFIED

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AS STATE OF LOUISIANA VERSUS KEVAN BRUMFIELD, DOCKET NUMBER 1-94-583 OF SECTION ONE OF THE NINETEENTH JUDICIAL DISTRICT COURT SHOWING THAT THE DEFENDANT [138]WAS CHARGED ON OCTOBER THE 5TH OF 1993 WITH BATTERY OF A POLICE OFFICER AND WAS IN FACT SUBSEQUENTLY CONVICTED OF THAT OFFENSE.

THE COURT: ANY OBJECTION?

MR. BROWN: NONE, YOUR HONOR.

THE COURT: YOU MARKED THAT AS FIVE?

MS. BURNS: YOUR HONOR, THAT—YES.

THE COURT: I SHOW YOU'RE UP TO—

MS. BURNS: SIX.

THE COURT: SIX. THAT'S 6(A).

BY MS. BURNS:

Q. DR. GUIN, DURIING YOUR HISTORY OF MR. BRUMFIELD DID HE ADVISE YOU OF THE EXTENT OF HIS WORK HISTORY DURING HIS TWENTY SOME ODD YEARS?

A. HE INFORMED ME AND OTHERS INFORMED ME THAT HE ATTENDED CAMELOT COOKING SCHOOL AND FINISHED THERE AND THAT HE COOKED AT TWO RESTAURANTS.

Q. OKAY. WAS THE MAXIMUM PERIOD OF HIS WORK HISTORY APPROXIMATELY THREE MONTHS AT RALPH AND KACOO'S DURING HIS ENTIRE ADULT LIFE?

A. SOMEWHERE IN THAT NEIGHBORHOOD.

Q. AND DID HE INDICATE TO YOU WHAT HIS PREFERENCE WAS FOR EARNING A LIVING?

A. YES. HE SAID THAT HE—IT WAS—THAT DRUG DEALING WAS MUCH MORE EFFECTIVE.

Q. AND IS THAT THE REASON HE QUIT HIS JOB AT RALPH AND KACOO'S, WAS THAT SELLING DRUGS AND GUNS WAS MORE PROFITABLE TO HIM?

A. HE SUGGESTED THAT HE HAD A NUMBER OF CHILDREN AND COULD NOT SURVIVE ON HIS INCOME AT RALPH AND KACOO'S.

Q. ARE YOU AWARE OF THE FACT THAT IN DR. JORDAN'S REPORT AT PAGE 2 HE DISCUSSES MR. BRUMFIELD'S LIFESTYLE AND STATES [139]THAT HE'S BEEN QUITE ACTIVE SOCIALLY? DIRECT YOU TO—THAT WOULD BE THE FOURTH

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FULL PARAGRAPH ON PAGE 2 OF DR. JORDAN'S REPORT.

A. OKAY.

Q. HE STATES THAT HE'S BEEN QUITE ACTIVE SOCIALLY. HE REPORTS HAVING FIVE ILLEGITIMATE CHILDREN WHO HE DOES NOT SUPPORT BY THREE DIFFERENT FEMALES AND HE ENJOYS AN ACTIVE LIFESTYLE WITH SOCIALIZING, DRUG DEALS, AND RELATED ASPECTS OF NIGHT LIFE. DID HE DISCUSSED THIS WITH YOU?

A. WELL, I DISCUSSED THAT WITH THE MOTHER OF HIS FIRST TWO CHILDREN AND THAT'S NOT WHAT SHE TOLD ME. AS A MATTER OF FACT, SHE TOLD ME THAT HE SUPPORTED HER FIRST CHILD.

Q. SO IF HE HAD TOLD THIS TO DR. JORDAN, SOMEONE WOULD NOT BE TELLING THE SAME THING TO BOTH OF YOU. WOULD THAT BE CORRECT?

A. WE PROBABLY DIDN'T ASK THE SAME QUESTIONS.

Q. DOCTOR, WE TALKED ABOUT LOW BIRTH WEIGHT, PROBLEMS AT HOME, THINGS THAT MIGHT AFFECT MANY OF US IN THIS COURTROOM IF WE LOOKED BACK TO ALL OF OUR HISTORIES.

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WOULD YOU ALSO SAY THAT A PERSON HAS GOT TO WANT TO BEHAVE AND BE LAW ABIDING AS WELL? IS THIS SOMETHING YOU FACTOR IN?

A. I THINK THE DIFFERENTIATION I MADE IS—THIS IS WHY I KEEP HARPING ON THE PHYSIOLOGICAL STUFF. IF THERE'S SOMETHING WRONG WITH YOU PHYSICALLY, SOMETIMES YOU CAN WANT EVERYTHING IN THE WORLD, AND IF THERE'S SOMETHING THE MATTER WITH YOUR BODY OR YOUR BRAIN, IT'S VERY HARD TO ACCOMPLISH THESE GOALS. THAT WAS THE POINT I WAS TRYING TO MAKE ABOUT THE DIFFERENCE BETWEEN THE PHYSICAL PROBLEM AS OPPOSED TO JUST SOME ESOTERIC PSYCHOLOGICAL PROBLEM, THAT WE HAVE A PHYSICAL BASIS.

Q. AND ARE YOU AWARE OF THE CONCLUSION OF DR. JORDAN THAT STATES THAT THIS MAN IS A SOCIOPATH, HE HAS A SOCIOPATHIC [140] PERSONALITY DISORDER, ANTISOCIAL TYPE, POOR IMPULSE CONTROL, ESPECIALLY IN THE AREA OF AGGRESSION, HE HAS ALWAYS BEEN INVOLVED WITH ANTI-AUTHORITY CONFLICT, AND AGGRESSION WITH PEERS? PHYSICAL AGGRESSION HAS BEEN CHRONICALLY EVIDENT AND THERE HAS BEEN AT LEAST ONE INCIDENT OF ASSAULT WITH A WEAPON ON AN IMPULSIVE BASIS IN 1989. WHILE MOST OF THE PATIENT'S CRIMINAL ACTIVITIES ARE PROBABLY THOUGHT THROUGH, HE CAN ENGAGE IN IMPULSIVE BEHAVIOR AT TIMES.

MR. BROWN: YOUR HONOR—

Q. DID YOU CONSIDER—

MR. BROWN: YOUR HONOR, CAN WE APPROACH?

THE COURT: SURE.

REPORTER'S NOTE: AT THIS TIME BOTH COUNSEL FOR THE ACCUSED AND COUNSEL FOR THE STATE APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT OUT OF THE HEARING OF THE JURY.

MR. BROWN: YOUR HONOR, I OBJECT TO THIS HEARSAY.

THE COURT: ON DIRECT TESTIMONY SHE INDICATED THAT THIS WAS ONE OF THE THINGS SHE USED AS REFERENCE IN THE OPINIONS THAT SHE HAD.

MR. BROWN: I DON'T THINK THAT GIVES HER THE AUTHORITY TO READ THE REPORT OUT LOUD TO THE JURY AND I OBJECT FOR THE RECORD.

THE COURT: OVERRULE. NOTE YOUR OBJECTION.

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REPORTER'S NOTE: THIS MATTER RESUMED WITH ALL PARTIES REMAINING PRESENT IN THE COURTROOM.

BY MS. BURNS:

Q. YOU ARE AWARE OF THAT DOCTOR'S CONCLUSIONS; IS THAT CORRECT?

A. I'M SORRY. WHAT'S THE QUESTION AGAIN?

Q, I READ TO YOU THE CONCLUSION IN HIS REPORT. YOU DID [141]CONSIDER THAT AND FACTOR THAT INTO YOUR OPINION?

A. I CONSIDERED THE ENTIRE REPORT AND NOT JUST THE PART THAT YOU READ.

Q. AND NOT JUST THE PORTIONS THAT THIS DEFENDANT SELECTIVELY GAVE TO YOU AS WELL; IS THAT CORRECT?

A. YOU WANT ME TO GO OVER SOME OF THE OTHER PARTS WITH YOU?

Q. NO, MA'AM. I'M JUST TRYING TO GET THE FULL PICTURE TO THIS JURY, NOT PORTIONS THAT HAVE BEEN OMITTED.

A. I WENT THROUGH EVERY SINGLE PSYCHOLOGICAL REPORT THAT WAS EVER DONE ON KEVAN.

Q. THANK YOU.

MS. BURNS: YOUR HONOR, AT THIS TIME THE STATE WOULD MOVE TO EXHIBIT TO THE JURY STATE-6.

THE COURT: OBJECTION?

MR. BROWN: I'D LIKE TO SEE IT, YOUR HONOR.

THE COURT: HOLD UP, JUST A MINUTE.

MR. BROWN: NO, SIR.

THE COURT: NO OBJECTION?

MR. BROWN: NO OBJECTION.

THE COURT: LET IT BE OFFERED.

REPORTER'S NOTE: AT THIS TIME STATE-EXHIBIT NUMBER 6 WAS PUBLISHED TO THE JURY AND THIS MATTER RESUMED AS FOLLOWS:

MS. BURNS: YOUR HONOR, I HAVE NO FURTHER QUESTIONS OF THE WITNESS.

THE COURT: MR. BROWN?

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[142]REDIRECT EXAMINATION

BY MR. BROWN:

Q. DR. GUIN, YOU RELIED ON THE RECORDS YOU RECEIVED FROM THE PARISH PRISON IN REGARD TO ANY INCIDENT INVOLVING KEVAN?

A. I DID. AND I WAS UNDER THE IMPRESSION THAT THEY WERE RECEIVED BY COURT ORDER AND THAT I HAD ALL OF THE RECORDS AND I HAD NO RECORD WHATSOEVER OF ANY CONVICTION FOR ANYTHING.

Q. IF YOU HAD KNOWN ABOUT THE OTHER PROBLEMS, WOULD YOUR OPINION HAVE CHANGED?

A. I COULDN'T FIND THE DATE THAT THAT HAPPENED AND THAT WOULD HAVE AFFECTED SOME OF MY OPINION. BUT, NO; MY OPINION BASICALLY WOULDN'T HAVE CHANGED. IT DOES MAKE ME NERVOUS, THOUGH, THAT THIS MUST BE OFFICIAL RECORDS AND WE DON'T GET THEM, BECAUSE I RELY ON THOSE.

Q. YOU WERE ASKED ABOUT YOUR OPINION REGARDING CAPITAL PUNISHMENT. YOU STATED YOUR OPINION WAS THREEFOLD AND YOU STATED YOUR FIRST REASON.

MS. BURNS: YOUR HONOR, AT THIS TIME I'M GOING TO MAKE AN OBJECTION THAT

THIS IS OUTSIDE OF THE SCOPE GOING BACK INTO REDIRECT.

THE COURT: APPROACH.

REPORTER'S NOTE: BOTH OF THE DEFENSE COUNSEL AND THE COUNSEL FOR THE STATE APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT OUT OF THE HEARING OF THE JURORS.

MS. BURNS: THAT WAS DURING THE PREDICATE PHASE AND NOT ON DIRECT EXAMINATION.

MR. BROWN: THE COURT INDICATED THAT IT WOULD ALLOW ME TO HAVE THE WITNESS FULLY EXPLAIN HER ANSWER.

THE COURT: WHY DIDN'T YOU DO IT ON DIRECT?

MR. BROWN: BECAUSE I THOUGHT IT WAS THE [143]COURT'S RULING THAT I WOULD BE ALLOWED AT THIS TIME TO GO INTO IT.

THE COURT: I NEVER SAID YOU COULD GO INTO IT AT ANY TIME. I SAID YOU COULD ASK HER FOR THE OTHER TWO PARTS AND NOT ON CROSS-EXAMINATION. I AM GOING TO SUSTAIN THE OBJECTION.

MR. BROWN: NOTE OUR—

THE COURT: I WANT TO MAKE SURE I EXPLAINED IT TO YOU, YOU COULD GO INTO THE OTHER TWO PARTS AND THAT WOULD BE ON DIRECT, WHICH WOULD HAVE BEEN THE FAIR THING TO DO. SO I AM NOT GOING TO LET YOU BACK-DOOR THIS IN.

MR. BROWN: PLEASE NOTE MY OBJECTION.

REPORTER'S NOTE: THIS MATTER RESUMED AS FOLLOWS WITH ALL PARTIES REMAINING PRESENT IN THE COURTROOM:

BY MR. BROWN:

Q. DR. GUIN, IN YOUR EXPERT OPINION, IS KEVAN ABLE TO ADEQUATELY EXIST IN A STRUCTURED ENVIRONMENT SUCH AS PRISON?

MS. BURNS: OBJECTION.

THE COURT: SUSTAINED.

MR. BROWN: YOUR HONOR, PLEASE NOTE MY OBJECTION FOR THE RECORD. THAT'S ALL I HAVE. THANK YOU.

THE COURT: YOU CAN STEP DOWN, MA'AM.

WITNESS EXCUSED

Appendix D

MR. BROWN: DEFENSE WILL CALL DR. JOHN BOLTER.

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APPENDIX E — TESTIMONY OF DR. JOHN BOLTER, EXCERPT OF TRANSCRIPT OF SENTENCING HEARING OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, CRIMINAL SECTION I, DATED JULY 3, 1995

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

NUMBER: 1–93–865

STATE OF LOUISIANA

VS.

KEVAN BRUMFIELD

TRANSCRIPT OF
SENTENCING HEARING

MONDAY, JULY 3, 1995

THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

* * *

[144]JOHN BOLTER, CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, AFTER HAVING FIRST BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

Appendix E

DIRECT EXAMINATION

BY MR. BROWN:

Q. GOOD AFTERNOON, DOCTOR.

A. GOOD AFTERNOON, SIR.

Q. COULD YOU STATE YOUR NAME AND ADDRESS FOR THE RECORD?

A. IT'S JOHN FRANCIS BOLTER. MY ADDRESS IS THE NEUROMEDICAL CENTER, 7777 HENNESSY BOULEVARD, SUITE 10000, BATON ROUGE, LOUISIANA 70808.

Q. SIR, WHAT IS YOUR OCCUPATION?

A. I'M A CLINICAL NEUROPSYCHOLOGIST.

Q. AND WHAT EXACTLY DOES CLINICAL NEUROPSYCHOLOGY INVOLVE?

A. WELL, IN—IN—IN SIMPLE TERMS, I'M CONCERNED WITH WHAT THE EFFECTS OF BRAIN INJURY OR INSULT TO SOMEBODY'S CENTRAL NERVOUS SYSTEM ON THEIR BEHAVIOR—WHAT DOES IT EXPLAIN IN TERMS OF THEIR BEHAVIOR.

Q. HAVE YOU BEEN ACTIVE IN YOUR FIELD?

A. YES, SIR. I JUST FINISHED—WELL, I'M WRITING A BOOK CHAPTER ON ANATOMY; I PUBLISH NATIONALLY; I GO TO EVERY MAJOR CONFERENCE IN THE COUNTRY IN MY FIELD; I JUST FINISHED BEING THE CHAIRMAN FOR THE LOUISIANA STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS; I'VE BEEN THE PRESIDENT OF OUR STATE ASSOCIATION. SO I'M VERY ACTIVE.

Q. OKAY. DO YOU HAVE ANY EDUCATIONAL DEGREES?

A. YES, SIR; I DO. I HAVE A BAHCELOR'S DEGREE FROM THE UNIVERSITY OF CALIFORNIA BERKELEY, MASTER'S DEGREE IN PHYSIOLOGICAL PSYCHOLOGY FROM THE UNIVERSITY OF THE PACIFIC; I HAVE A PH.D FROM THE UNIVERSITY OF MEMPHIS IN CLINICAL NEUROPSYCHOLOGY.

Q. DID YOU RECEIVE ANY ACADEMIC HONORS WHILE RECEIVING [145]YOUR ACADEMIC TRAINING?

A. YES. I GRADUATED WITH GREATEST DISTINCTION FROM THE UNIVERSITY OF CALIFORNIA PHI BETA KAPPA; I WAS ELECTED THE MOST OUTSTANDING GRADUATE IN MY CLASS IN MY DOCTORATE; I WAS AWARDED VARIOUS SCHOLARSHIPS; I WAS ON A NATIONAL HEALTH SCHOLARSHIP WITH THE ARMY AND WENT INTO THE ARMY FOUR YEARS AFTER

FINISHING SCHOOL.

Q. AND DO YOU HOLD ANY PROFESSIONAL LICENSES?

A. I'M LICENSED AS A PSYCHOLOGIST FROM LOUISIANA AND A PSYCHOLOGIST FROM CALIFORNIA.

Q. HAVE YOU—DURING YOUR EDUCATIONAL STUDIES DID YOU DO ANY INTERNSHIPS?

A. WE'RE REQUIRED TO DO WHAT WE CALL A PRE-DOC INTERNSHIP AND A POST-DOC SUPERVISION PERIOD AND I DID MY PRE-DOC INTERNSHIP AT THE WALTER REED ARMY MEDICAL CENTER. I WAS ON ACTIVE DUTY IN THE ARMY AT THE TIME.

MR. BROWN: YOUR HONOR, AT THIS TIME I WOULD TENDER DR. BOLTER AS AN EXPERT IN THE FIELD OF NEUROPSYCHOLOGY.

MS. BURNS: THE STATE HAS NO OBJECTION, YOUR HONOR.

THE COURT: THE COURT WILL ACCEPT THE DOCTOR AS AN EXPERT IN NEUROPSYCHOLOGY.

BY MR. BROWN:

Appendix E

Q. DOCTOR, DID YOU HAVE OCCASION TO EXAMINE KEVAN BRUMFIELD?

A. YES; I DID, SIR.

Q. COULD YOU TELL THE JURY WHAT THE RESULTS OF THAT EXAMINATION WAS?

A. I GAVE HIM A COMPREHENSIVE BATTERY OF TESTS THAT ARE SENSITIVE TO BRAIN FUNCTIONS AND MY PRIMARY PURPOSE IN DOING THE EVALUATION WAS TO DETERMINE TO WHAT EXTENT—EXCUSE ME—[146]HE MAY BE MANIFESTING ANY KIND OF NEUROLOGICAL DEFICITS IN COGNITIVE FUNCTIONS AND AS A RESULT OF THAT EVALUATION AND TAKING A CLINICAL HISTORY FROM THE PATIENT AND REVIEWING THE FEW RECORDS THAT I DID HAVE, IT APPEARED THAT MR. BRUMFIELD WAS MANIFESTING EARLY ON IN LIFE A CONDUCT DISORDER WITH EXTREME LEVELS OF AGGRESSIVITY AND A DISREGARD FOR THE BASIC RIGHTS OF OTHERS. HE APPEARED TO HAVE EDUCATIONAL PROBLEMS AND HE LOOKED AS IF HE HAD AN ATTENTION DEFICIT DISORDER OF SOME TYPE. HE—AS HE BECAME AN ADULT, HE EMERGED INTO WHAT LOOKS MORE LIKE AN ANTISOCIAL PERSONALITY AS YOU'VE HEARD IT. I LINK THE TERM THEY USED WAS SOCIOPATHIC PERSONALITY. THAT'S AN OLD TERM. WE CALL IT ANTISOCIAL NOWADAYS. AND HE APPEARS TO CONTINUE

TO HAVE THIS ATTENTION DIFFICULTY. IT'S REALLY AFFECTING HIM IN TERMS OF BEING ABLE TO SUSTAIN HIS CONCENTRATION FOR AN EXTENDED PERIOD OF TIME. BUT OTHER THAN THAT, IT'S NOT ACCOUNTING FOR A GREAT DEAL. HE ALSO APPEARS TO HAVE WHAT WE CALL BORDERLINE GENERAL LEVEL OF INTELLIGENCE. HIS I.Q. IS IN A RANGE—THE APPROXIMATE IS ABOUT—I THINK IT'S—THE EXACT FIGURE IS SIX POINT SEVEN PERCENT OF THE GENERAL POPULATION. SO HE'S ON THE LOW END OF INTELLIGENCE. HIS ACADEMIC SKILLS ARE VERY POOR. HE'S READING AT ABOUT THE FOURTH GRADE LEVEL, AND THAT'S SIMPLE WORD RECOGNITION. THAT'S NOT EVEN COMPREHENSION; THAT'S JUST IDENTIFYING. HIS MATH AND SPELLING SKILLS ARE AT ABOUT THE SIXTH GRADE LEVEL.

Q. DID YOU DETECT ANY ORGANIC BASED AMNESIA? COULD YOU EXPLAIN WHAT THAT IS, FIRST OF ALL?

A. WELL, ONE OF THE THINGS I'M LOOKING FOR IS WHETHER THERE IS ANY SUGGESTION OF A NEUROLOGICAL BASIS FOR ANY MEMORY LOSS. HE DOESN'T OFFER ANY COMPLAINTS. HE DOESN'T SAY, I HAVE MEMORY LOSS, PER SE'. BUT WHEN YOU TEST HIM, WHAT YOU FIND QUICKLY IS THAT HE DOES SHOW A RAPID RATE OF [147]FORGETTING THAT WE GENERALLY THINK AS BEING AN ORGANIC AMNESIA;

MEANING, THAT IT'S RELATED TO SOME KIND OF DISTURBANCE IN HIS BRAIN. HOWEVER, IF HE'S HAD AN OPPORTUNITY TO HEAR THE INFORMATION REPEATEDLY, HE CAN ACQUIRE AND HE CAN RETAIN AND IT APPEARED TO BE MORE A PRODUCT OF HIS ATTENTION DEFICIT DISORDER.

Q. AND IT MAY BE SELF EVIDENT, BUT COULD YOU EXPLAIN EXACTLY WHAT THE ATTENTION DEFICIT DISORDER IS?

A. WELL, IN THE OLD DAYS WE USED TO CALL IT HYPERACTIVITY, PER SE', AND IT WAS PRIMARILY RELATED TO THE RESTLESSNESS THAT CHILDREN SOMETIMES MANIFEST AND THE ESTIMATES OF THE GENERAL POPULATION ARE ANYWHERE FROM THREE TO EIGHT PERCENT OF THE CHILDREN HAVE THIS DISORDER. AS TIME HAS GONE ON, WE'VE SEEN IT AS MORE COMPLICATED. IT SEEMS TO BE A DIAGNOSIS THAT'S IN VOGUE RIGHT NOW. I THINK YOU SEE IT ALL OVER THE PLACE. BUT IN ANY CASE, SOME CHILDREN ACTUALLY DO HAVE IT AND IT'S RELATED TO AN INABILITY TO FOCUS, TO CONCENTRATE AND FOCUS. IT MAY BE ASSOCIATED WITH HYPERACTIVITY; MEANING THAT RESTLESSNESS, THAT FIDGITINESS THAT YOU SOMETIMES SEE, BUT IT'S NOT ALWAYS. IT HAS A CLINICAL COURSE IN THE SENSE THAT IT CONTINUES THROUGHOUT ADULTHOOD AND IT MAY INTERFERE WITH A PERSON'S ABILITY TO

OBTAIN OCCUPATIONAL GOALS, ASPIRATIONS. IT MAY INTERFERE WITH THEIR INTERPERSONAL LIFE BECAUSE THEY TEND TO BE IMPULSIVE AND SHORTSIDED AND THEY ALSO—WELL, IT'S OFTEN ASSOCIATED WITH WHAT WE CALL CHROME MORBIDITY; MEANING THAT THERE IS OFTEN A HIGH INCIDENCE OF ALCOHOL OR DRUG USE IN OUR POPULATION AND A VARIETY OF OTHER MOOD DIFFICULTIES. BUT IN EFFECT, IT'S A—IT'S A BASIC DEFICIT SOMEWHERE IN THE BRAIN. THAT'S WHAT WE THEORIZE, ANYWAY, THAT THIS PERSON HAS SOME KIND OF A PHYSICAL PROBLEM THAT PREVENTS HIM FROM CONCENTRATING AS WELL AS HE SHOULD.

[148]Q. DOCTOR, LET ME TAKE YOU TO THE INCIDENT OF KEVAN BRUMFIELD'S BIRTH, A BIRTH WEIGHT BETWEEN EITHER TWO AND A HALF POUNDS OR THREE AND A HALF POUNDS. WHAT DOES THAT MEAN TO YOU?

A. WELL, IT JUST PLACES HIM IN A RISK OF SOME FORM OF POTENTIAL NEUROLOGICAL TRAUMA. IT'S—BIRTH WEIGHT—GENERALLY, VERY LOW BIRTH WEIGHTS, LIKE ONE POINT FIVE POUNDS, ARE CLEARLY ASSOCIATED WITH SIGNIFICANT MENTAL DIFFICULTIES. WHEN THEY GET INTO THE THREE AND FOUR POUND RANGE, IT'S NOT ALWAYS PREDICTING OF THAT, AND THERE CAN BE CHILDREN THAT ARE JUST FINE AT THAT WEIGHT. BUT IT PORTENDS THE

POSSIBLE PROBLEM. BUT I DIDN'T HAVE ANY RECORDS DURING—WHAT THE ACTUAL BIRTH WAS LIKE, WHAT HIS SUBSEQUENT ABILITY TO THRIVE WAS LIKE AT THAT TIME, SO I DON'T KNOW WHAT HAPPENED.

Q. ARE YOU SAYING THAT HIS ABILITY TO ADEQUATELY DEAL WITH SOCIETY IS DEPENDENT UPON OTHER FACTORS?

A. I WOULD SAY THAT IF YOU JUST LOOK AT—THE CURSORY UNDERSTANDING THAT I HAVE OF HIS HISTORY AND THE TIME I HAD TO INTERVIEW HIM AND WHAT THE RECORDS INDICATE, THIS INDIVIDUAL WAS IN TROUBLE MANY MANY MANY MANY YEARS AGO. THEY TRIED TREATING HIM. UNFORTUNATELY, HE DIDN'T STAY ON HIS MEDICATIONS. THEY GAVE HIM SOME PRETTY STRONG MEDICATIONS; THE THORAZINE, AND I BELIEVE HE WAS GETTING READY TO TRY ON MELLARIL, BUT HE REFUSED TO TAKE THOSE. HE EVEN TELLS YOU THAT HE REFUSED TO TAKE THEM.

Q. WHAT IS MELLARIL?

A. ITS AN ANTIPSYCHOTIC. THEY USE MELLARIL AND THORAZINE—THEY DON'T USE THOSE QUITE AS OFTEN TODAY, BUT THEY WILL USE THEM FOR CONTROLLING EXTREME DISCONTROLLED BEHAVIOR.

Q. IS THORAZINE STRONGER THAN MELLARIL?

A. NO. IT JUST DEPENDS ON THE DOSE.

[149]Q. ARE THEY COMMONLY PRESCRIBED DRUGS FOR CHILDREN?

A. COMMON FOR DISORDERLY CHILDREN? THEY USED TO BE, BUT NOT AS MUCH NOW. NOW THERE ARE OTHER ALTERNATIVES. WE'VE GOTTEN BETTER WITH THE MEDICATIONS AND—AND THEY'RE MORE SELECTIVE. THORAZINE, IN PARTICULAR, IS EXTRAORDINARILY SEDATING AND IT MAKES A PERSON FEEL A LITTLE SOUPY HEADED, CLOUDY, AND THEY GENERALLY DON'T LIKE TAKING IT AND SO THEY WILL RESIST IT.

Q. OKAY. WHAT ARE THE EFFECTS OF MELLARIL?

A. THAT'S THE SAME TYPE OF THING; NOT QUITE AS SEDATING.

Q. IN YOUR EXPERIENCED EXPERT OPINION, ARE THEY ONLY USED IN SEVERE CASES?

A. GENERALLY, YES; THAT'S TRUE. YEAH.

Q. DOCTOR, WERE YOU ABLE TO REVIEW THE REPORT OF DR. BRYAN JORDAN EARLIER?

A. YES, I WAS.

Q. WHAT WERE YOU ABLE TO GLEAN OUT OF THAT REPORT OR WAS THERE ANY INCONSISTENCIES WITH YOUR FINDINGS?

A. DR. JORDAN RATED HIS INTELLIGENCE JUST A LITTLE HIGHER THAN I DID. BUT DR. JORDAN ALSO ONLY DID A SCREENING TEST AND I GAVE A STANDARDIZED MEASURE OF INTELLECTUAL FUNCTIONING. DR. JORDAN THOUGHT THERE MIGHT BE AN ATTENTION DEFICIT DISORDER AND I'LL AGREE WITH THAT. DR. JORDAN ALSO IDENTIFIED HIM AS HAVING A, QUOTE, UNQUOTE, SOCIOPATHIC PERSONALITY AND AS I INDICATED TO THE JURY, THAT'S REALLY THE SAME THING AS ANTISOCIAL. SO I'LL AGREE WITH THAT.

Q. YOU—WHAT WAS THE I.Q. TEST THAT YOU GAVE HIM?

A. I GAVE HIM THE WEBSTER ADULT INTELLIGENCE TEST.

Q. AND WHAT WAS HIS SCORE ON THAT?

A. THE EXACT SCORE?

Q. WAS IT A 75?

A. YES, SIR; IT'S A 75.

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[150]Q. OKAY. IS THERE A DIFFERENCE BETWEEN A V.I.Q. AND A P.I.Q.? COULD YOU EXPLAIN THAT?

A. SOMETIMES YOU'LL SEE REMARKABLE DIFFERENCES BETWEEN VERBAL INTELLIGENCE AND NON-VERBAL OR MECHANICAL TYPES OF INTELLIGENCE AND HE HAS A SLIGHT DIFFERENCE BUT IT'S NOT CONSIDERED STATISTICALLY OR CLINICALLY IMPORTANT. AND BOTH OF THOSE ARE IN THE 70'S.

Q. WHAT ABOUT HIS READING CAPACITY?

A. HE'S READING AT—AS I'VE INDICATED EARLIER ON THAT—AND THIS IS JUST WORD RECOGNITION READING. THIS IS NOT COMPREHENSION, WHICH IS A MORE DIFFICULT TASK. HIS WORD RECOGNITION READING IS AT THE FOURTH GRADE LEVEL.

Q. THANK YOU, DOCTOR.

[151]CROSS-EXAMINATION

BY MS. BURNS:

Q. DOCTOR, JUST A VERY VERY FEW QUESTIONS. I.Q. TESTS DO NOT FACTOR IN THINGS SUCH AS WHAT I CALL STREET SMARTS, THE ABILITY TO FUNCTION OUT IN THE REAL WORLD, IN THAT SENSE; IS THAT CORRECT?

A. GENERALLY, NO, MA'AM; THEY DON'T.

Q. AND COULD I ASK YOU TO DESCRIBE TO THE JURY WHAT SOME OF THE CHARACTERISTICS OF A PERSON HAVING AN ANTISOCIAL PERSONALITY DISORDER ARE, PLEASE?

A. WELL, ON A BASIC LEVEL IT'S AN ABSENCE OF A CONSCIENCE. IT'S THE ABILITY TO DISREGARD THE RIGHTS AND FEELINGS OF OTHERS IN FAVOR OF WHAT YOU WANT, IN PARTICULAR, AT ANY GIVEN TIME AND YOU HAVE THE CAPACITY TO MANIPULATE PEOPLE SO THAT YOU CAN SEEK OUT WHAT YOU WANT. AND THERE IS NO SENSE OF COMPUNCTION OR REMORSE.

Q. THANK YOU VERY MUCH.

THE COURT: REDIRECT?

[152]REDIRECT EXAMINATION

BY MR. BROWN:

Q. DOCTOR, IN YOUR EXPERT OPINION, ARE THE FACTORS OF THE LOW BIRTH WEIGHT AND THE ATTENTION DEFICIT AND THE I.Q. LEVEL AND THE CULMINATION OF PROBLEMS; THE ORGANIC MEMORY PROBLEM THAT YOU RELATED TO THE JURY, IS THAT A FACTOR IN THE CULMINATION OF WHAT IS CALLED AN ANTISOCIAL PERSONALITY?

A. YEAH. THE EARLIER A CHILD IS IDENTIFIED AS HAVING PROBLEMS—AND I BELIEVE HE WAS HOSPITALIZED BY THE TIME HE WAS THIRTEEN YEARS OF AGE AND THEY HOSPITALIZED HIM FOR FOUR MONTHS, I BELIEVE IT WAS, AT GREENWELL SPRINGS, THAT TELLS YOU THAT THAT—THAT THAT CHILD IS CLEARLY AT RISK, GETTING WORSE AND GROWING INTO AN ADULT ANTISOCIAL PERSONALITY. AND HE CLEARLY DID.

Q. THANK YOU.

MR. BROWN: YOUR HONOR, THE DEFENSE RESTS.

THE COURT: STATE REBUTTAL?

MS. BURNS: STATE HAS NO REBUTTAL EVIDENCE, YOUR HONOR.

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APPENDIX F — CLOSING ARGUMENT OF THE STATE, EXCERPT OF TRANSCRIPT OF SENTENCING HEARING OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, CRIMINAL SECTION I, DATED JULY 3, 1995

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

NUMBER: 1-93-865

STATE OF LOUISIANA

VS.

KEVAN BRUMFIELD

TRANSCRIPT OF
SENTENCING HEARING

MONDAY, JULY 3, 1995

THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

* * *

[153]CLOSING ARGUMENT

Appendix F

BY MS. BURNS:

MAY IT PLEASE THE COURT, LADIES AND GENTLEMEN OF THE JURY. THE STATE WILL BE FAIRLY BRIEF IN ITS CLOSING ARGUMENT TO YOU CONCERNING THE PENALTY IN THIS CASE. I BELIEVE THE EVIDENCE IS VERY CLEAR. WHAT WE ARE ASKING YOU TO DO IN THIS CASE IS TO RETURN A SENTENCE, A PENALTY THAT FITS THE MAGNITUDE OF THE CRIME THAT WAS COMMITTED ON JANUARY THE 7TH OF 1993 THAT RESULTED IN THE TAKING OF A LIFE OF A THIRTY-SIX YEAR OLD FEMALE POLICE OFFICER, A CAREER OFFICER WHO WAS THE MOTHER OF SIX CHILDREN, A PRODUCTIVE MEMBER OF THIS BATON ROUGE COMMUNITY; A CASE IN WHICH ANOTHER WOMAN WAS REPEATEDLY SHOT AND INJURED; A CASE THAT THIS JURY HAS SEEN FROM THE EVIDENCE DURING THE GUILT PHASE OF THIS TRIAL, THAT WAS NOT A PRODUCT OF THE MOMENT, A PRODUCT OF IMPULSE, A PRODUCT OF SPONTANEITY, BUT WAS A CRIME THAT WAS CONCEIVED IN ADVANCE, PREPLANNED IN ADVANCE, WAS WELL THOUGHT OUT FOR THE PROFIT OF THE INDIVIDUALS THAT WERE INVOLVED, BUT WITH TOTAL DISREGARD, WITHOUT CONSCIENCE FOR THE VICTIMS IN THAT CASE OR THE SURVIVORS OF THAT VICTIM. THERE'S NOT MUCH IN THE SOCIETY WE LIVE IN—IT HAS TRULY DETERIORATED DURING THE COURSE OF MOST OF OUR LIFETIMES AND I

KNOW AS I GREW UP—YOU KNOW, YOU WILL HEAR THE EXPRESSION THAT NOTHING IS CERTAIN IN LIFE BUT DEATH AND TAXES AND THERE'S VERY LITTLE IN OUR LIFETIME THAT TRULY IS CERTAIN. YOU GO ABOUT YOUR LIFE TRYING TO MAKE ENDS MEET, TRYING TO HAVE SIMPLE JOYS WITH YOUR FAMILIES, LITTLE THINGS, AND YOU HOPE THAT THEY WILL COME ABOUT AND YOU HOPE THAT YOUR LIFE WILL PROGRESS TO ITS NATURAL END AND YOU HOPE THAT SOMETIMES—ALTHOUGH SOME OF US ASPIRE TO MORE THINGS THAN OTHERS—YOU CERTAINLY HOPE THAT THE JOYS OF WHAT YOU HAVE IN TERMS OF GOALS FOR YOURSELF; IF YOU MARRY AND HAVE CHILDREN, THE GOALS FOR THOSE CHILDREN, JUST THE BASIC [154] STANDARD RELATIONSHIPS THAT WE HAVE, YOU HOPE THAT YOU WILL SEE THEM OUT AND THAT THEY WILL BRING US SOME JOY AND THAT WE CAN PASS THEM ON TO OUR SURVIVORS. ONE OF THE THINGS THAT WE HOPE THAT WE'LL DO IS PERHAPS—AND SOMETIMES WE SAY I HOPE I DIE IN MY SLEEP AT A VERY OLD AGE, I HOPE THAT I LIVE TO SEE MY CHILDREN GROW UP AND GET MARRIED, GRADUATE FROM HIGH SCHOOL, THE SIMPLE THINGS LIKE THIS, THINGS THAT SHOULD NOT BE EXTRAORDINARY IN OUR LIVES AND WE THINK OF WHAT HAPPENED ON JANUARY THE 7TH OF 1993. YOU SEE A WOMAN WHO WAS CUT DOWN IN THE PRIME OF HER LIFE WHO WILL NEVER LOOK AT THOSE CHILDREN AGAIN, A WOMAN WHO WAS

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DEPRIVED OF SEEING HER CHILDREN GRADUATE FROM HIGH SCHOOL, GRADUATE FROM COLLEGE, GET MARRIED, HAVE CHILDREN OF THEIR OWN, A VERY BASIC THING. SHE WILL NEVER BE A GRANDMOTHER, AND THOSE CHILDREN—OUT OF THE NORMAL ORDER OF THINGS, WE BURY OUR PARENTS. ALL OF US EXPECT TO BURY OUR PARENTS AT SOME TIME BUT WE DON'T EXPECT TO DO THAT WHEN WE'RE NINE YEARS OF AGE ON UP TO EIGHTEEN YEARS OF AGE. IT'S NOT IN THE NORMAL COURSE OF THINGS. IF IT HAPPENS THROUGH SOMETHING AS TRAGIC AND UNFORESEEN AS A CAR ACCIDENT OR PLANE CRASH, SOMETHING VERY UNEXPECTED, AS TRAGIC AS THAT MAY BE, IT'S SOMETHING WE CAN COPE WITH, WE CAN PERHAPS RATIONALIZE AFTER THE FACT. BUT WHEN IT'S AT THE HANDS OF SOMEONE OF THE ILK AND LIKE OF THIS DEFENDANT, KEVAN BRUMFIELD, WHO ON HIS BIRTHDAY, WHEN ANY OF THE REST OF US WOULD BE OUT PERHAPS HAVING DINNER WITH OUR FRIENDS, HAVING A BIRTHDAY CAKE, DOING SOMETHING SIMPLE—WHAT DOES HE DO? HE TAKES THE LIFE OF A POLICE OFFICER IN THE FASHION THAT HE DID, WITHOUT ANY REMORSE, I SUBMIT TO YOU THAT YOU'VE SEEN IN THIS TRIAL, AND WITHOUT ANY CONSCIENCE JUST AS THIS DOCTOR, DR. BOLTER SAID. AND IN HIS SELFISHNESS HE HAS AFFECTED THE LIFE OF BETTY SMOTHERS' MOTHER WHO HAS HAD TO DO SOMETHING EXTRAORDINARY. PARENTS SHOULD NOT HAVE

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[155]TO BURY THEIR CHILDREN. THEY SHOULD NOT HAVE TO BURY THEIR CHILDREN AND THIS WOMAN HAS HAD TO BURY A THIRTY-SIX YEAR OLD GOOD CHILD, HER BABY DAUGHTER, AND SHE NOW IS AT HER AGE, WHEN SHE SHOULD BE LOOKING FORWARD TO THE END OF HER OWN LIFE, LOOKING FORWARD TO RETIRING AND LIVING OUT THE REST OF THOSE YEARS IN PEACE BECAUSE SHE'S RAISED HER TWO DAUGHTERS AND SHE SHOULD BE ABLE AT A DISTANCE TO ENJOY HER CHILDREN, SHE HAS NOW AT THE END OF HER LIFE BECOME A MOTHER AGAIN AND WARRICK DUNN VERY NICELY SUMMED IT UP. SHE'S NOT DOING IT BECAUSE SHE HAS TO, SHE DOES IT BECAUSE SHE WANTS TO. SHE'S STILL A YOUNG GRANDMOTHER. SHE IS TAKING A LOT OF JOY OUT OF LIVING WITH THOSE CHILDREN, BUT SHE HAS BEEN GIVEN A BURDEN IN LIFE THAT MOST PEOPLE SHOULD NOT—NOT HAVE TO BEAR. AND THOSE CHILDREN, AT THAT AGE TO HAVE TO BE TOLD THAT THEIR MOTHER IS GONE AND THAT THEIR MOTHER HAS BEEN TAKEN IN THAT FASHION AND THEN GO THROUGH WHAT THEY'VE HAD TO GO THROUGH DURING THE COURSE OF THIS TRIAL, IS UNFORGIVABLE AND IT IS UNFORGIVABLE, WHAT HAS BEEN DELIBERATE AND CALCULATED BY ANOTHER HUMAN BEING WHO HAS, I SUBMIT TO YOU, NO CONSCIENCE, WHO HAS NO REMORSE IN THIS CASE. HE HAS DEPRIVED AT LEAST SEVEN PEOPLE IN THE SMOTHERS HOUSEHOLD OF A

NORMAL LIFE. NO MATTER WHAT THEY DO, NO MATTER HOW GOOD THOSE CHILDREN WILL EVER BE, A PART OF THEIR LIFE IS GONE AND IT WILL—IT CAN NEVER BE MADE WHOLE AGAIN. IT CAN NEVER BE MADE WHOLE. THEIR LIVES WILL ALWAYS BE AFFECTED FROM THE MOMENT OF THAT MURDER UNTIL THE MOMENT OF THEIR DEATHS. AND THEIR LINK WITH THE WORLD, TRULY YOUR LINK WITH YOUR MOTHER IS THE LAST BOND FOR ALL OF US. YOU CAN BE FORTY-FIVE YEARS OF AGE AND HAVE A MOTHER WHO IS IN HER SIXTIES AND SEVENTIES AND YOU STILL FUNCTION AS IF YOU'RE A CHILD GROWING UP WITH YOUR MOTHER. THERE'S STILL THAT BOND WITH MOTHER AND CHILD THERE AND WHILE YOU MAY LOSE A FATHER, THAT MAY BE VERY HARD, THERE IS STILL [156]A BOND WITH YOUR MOTHER, THE MOTHER WHO CARRIES YOU FOR NINE MONTHS, THE MOTHER WHO GIVES YOU LIFE, AND WHEN SHE'S GONE AND GONE IN SUCH A FASHION, IT IS JUST EXTRAORDINARY. AND THE PAIN, THE PAIN OF THESE INDIVIDUALS CAN ONLY BRIEFLY BE ARTICULATED AND BY WATCHING THEIR FACES DURING THIS TRIAL. AND I BRING THIS UP BECAUSE AS WE TOLD YOU, WHEN YOU DETERMINE THE APPROPRIATE SENTENCE IN THIS CASE, YOU DETERMINE TWO FACTORS; YOU DETERMINE AND LOOK AT THE CIRCUMSTANCES OF THE KILLING OF BETTY SMOTHERS AND YOU CONSIDER, LIKEWISE, THE CHARACTER AND THE PROPENSITIES OF THIS DEFENDANT WHO

HAS TAKEN HER LIFE. AND AS THE STATE TOLD YOU, ONE OF THE FACTORS THAT YOU MAY CONSIDER IN DETERMINING THE MAGNITUDE OF THIS CRIME IS THE IMPACT OF HER KILLING ON HER IMMEDIATE SURVIVORS. AND THAT IS CERTAINLY SOMETHING THAT THE STATE OF LOUISIANA ASKS YOU TO TAKE INTO VERY STRONG ACCOUNT WHEN YOU DETERMINE THE PROPER, APPROPRIATE – AS THE LAW STATES, AN APPROPRIATE PENALTY FOR THIS MAN'S ACTIONS IN THIS CASE. WHAT AGGRAVATING CIRCUMSTANCES ARE PRESENT WITH RESPECT TO THE KILLING OF CORPORAL BETTY SMOTHERS? AS WE TOLD YOU, FOR THE JURY TO BE ABLE IN LOUISIANA TO RETURN THE PENALTY OF DEATH, THE STATE IS ONLY REQUIRED TO PROVE THE EXISTENCE OF ANY ONE OF THE ELEVEN STATUTORY AGGRAVATING CIRCUMSTANCES TO THIS JURY'S SATISFACTION. FOR THE JURY YESTERDAY TO HAVE RETURNED A VERDICT OF GUILTY OF FIRST DEGREE MURDER, YOU WOULD NECESSARILY HAVE ALREADY FOUND AT LEAST ONE OF THE AGGRAVATING CIRCUMSTANCES LISTED BY LAW. IN THIS CASE THERE IS NO QUESTION BUT THAT THE KILLING OF CORPORAL SMOTHERS AND THE REPEATED SHOOTING OF MS. KIMEN LEE OCCURRED DURING THE COURSE OF A PLANNED ATTEMPTED ARMED ROBBERY. AN ARMED ROBBERY—AND AS I'VE PREACHED BEFORE, WHAT IS IMPORTANT IN THIS CASE IN DETERMINING THE DEGREE OF AGGRAVATION

OF THIS MURDER, IS THAT THIS WAS NOT JUST A [157]SPONTANEOUS EVENT OF SOMEBODY WALKING INTO A CONVENIENCE STORE, PULLING OUT A HANDGUN AND PERHAPS KILLING THE CLERK; SOMETHING THAT WE COULD CONSIDER A VANILLA, A VERY PLAIN NON-AGGRAVATED FIRST DEGREE MURDER. THIS IS A SITUATION WHERE ACCORDING TO, AGAIN, THE TAPED STATEMENTS THAT YOU HEARD BY THE DEFENDANT KEVAN BRUMFIELD WHICH, OF COURSE, DURING HIS DEFENSE THROUGH HIS ATTORNEYS, HE ALLEGED TO HAVE BEEN COERCED, JUST AS EDDIE STEWART TOLD YOU THAT WHEN HE GAVE A TAPED STATEMENT CONCERNING HIS CRIME AGAINST ANTHONY MILLER, THAT HE READILY CONFESSED TO THE SAME DAY, LATER ON, AGAIN, YOU HEAR THE ALLEGATIONS. IT'S HIS M.O. HE'S STREET SMART, HE'S SAVVY, AND AFTER HE'S CONFESSED, WHAT IS HE GOING TO DO BUT GO BACK AND ATTACK THE OFFICERS WHO'VE GONE ABOUT DOING THEIR JOB, GIVING HIM HIS RIGHTS AND TAKING A PROPER STATEMENT? THIS IS KEVAN BRUMFIELD, ONCE AGAIN, A PERSON WHO IS MANIPULATIVE ACCORDING TO DR. BOLTER. HE KNOWS THE SYSTEM. HE HAS SURVIVED IN THAT SYSTEM VERY WELL WHILE OTHER PEOPLE HAVE NOT AND HAVE BEEN THE VICTIMS OF HIS VERY AGGRAVATED AND VICIOUS CRIMES, VICTIMS THAT YOU HEARD IN THIS COURTROOM THIS MORNING, VICTIMS THAT YOU HEARD OVER THE

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LAST SEVEN DAYS OF THIS TRIAL. THE CRIME OCCURRED DURING THE COURSE OF AN ATTEMPTED ARMED ROBBERY. THERE IS ONE AGGRAVATING CIRCUMSTANCE PRESENT UNDER LAW. CORPORAL SMOTHERS WAS, AGAIN, A PEACE OFFICER; A POLICEMAN WHO WAS PERFORMING LAWFUL DUTIES AT THE TIME SHE MET HEIR DEATH. THIS IS A SECOND AGGRAVATING CIRCUMSTANCE. AND LADIES AND GENTLEMEN, WHEN YOU THINK IN YOUR MIND OF WHAT ARE SOME OF THE WORST MURDERS THAT CAN HAPPEN, I THINK MANY OF US THINK OF THE MURDER OF A POLICE OFFICER AS ONE OF THE MOST BRAZEN, ANTI-AUTHORITY, DEFIANT TYPES OF KILLINGS THAT OCCUR. THE POLICE IN OUR SOCIETY—AND ALL OF YOU WERE QUESTIONED ABOUT YOUR FEELINGS ABOUT POLICE OFFICERS. IN OUR MINDS WE [158]ALWAYS WANT THEM THERE WHEN WE'RE IN TROUBLE. WE DON'T WANT THEM FOLLOWING US ON THE INTERSTATE. WE ALL HAVE THOSE NATURAL REACTIONS TO THEM. BUT THEY PERFORM A FUNCTION IN OUR SOCIETY THAT MOST PEOPLE DO NOT WANT TO PERFORM BECAUSE THEY'RE UNDERPAID, THEY'RE OVERWORKED, AND MS. WHEELER TOLD YOU HER DAUGHTER, AT THE AGE OF TWENTY-TWO, THAT WAS SOMETHING SHE ALWAYS WANTED TO DO. SHE WAS PROUD, OBVIOUSLY, OF WEARING THAT UNIFORM AND SHE INSTILLED IN HER CHILDREN THE FACT THAT YOU DON'T HAVE TO COMMIT CRIMES, YOU

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DON'T HAVE TO BE CRIMINALS TO LIVE IN SOCIETY. SHE TRIED TO PUT THOSE GOOD VALUES, THOSE JUST DECENT VALUES, EVEN THOUGH THERE WERE SIX CHILDREN THERE AND SHE WAS OBVIOUSLY STRUGGLING, WORKING VERY HARD, WORKING AT LEAST TWO JOBS ALL THE TIME TO MAKE ENDS MEET AND SHE FOUND TIME TO GO OUT AND TO COACH THOSE CHILDREN, COACH OTHER PEOPLE'S CHILDREN. SHE FOUND TIME FOR OTHER PEOPLE. THAT WAS JUST THE KIND OF PERSON THAT BETTY SMOTHERS WAS AND THOSE VALUES HAVE OBVIOUSLY BEEN INSTILLED IN HER CHILDREN. AND WHEN YOU KILL THAT TYPE OF PERSON WHO GOES ABOUT EVERY DAY WORKING FOR US, THAT IS TRULY A PUBLIC SERVANT. LADIES AND GENTLEMEN, I SUBMIT TO YOU THAT IS ONE OF THE WORST FORMS OF MURDER, IF NOT THE VERY WORST FORM THAT CAN OCCUR IN OUR SOCIETY, PARTICULARLY THE VERY VIOLENT SOCIETY THAT WE LIVE IN IN THE UNITED STATES IN THE 1990'S. AND DURING THE COURSE OF THIS TRIAL THOSE VERY POLICE OFFICERS WHO GO ABOUT AND TRY TO PROTECT US EVERY DAY HAVE BEEN ASSAILED, HAVE BEEN DEFAMED THROUGH THE ALLEGATIONS OF THIS DEFENDANT WHEN HE IS THE PERSON WHO IS ON TRIAL. HE IS A MENACE TO SOCIETY AND THE WORST FORM AND HE HAS BEEN A MENACE TO SOCIETY PRIOR TO EVEN BECOMING AN ADULT. HE HAS BEEN ON AN ESCALATING, RAPID COURSE OF

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ANTISOCIAL CONDUCT. CONDUCT; SOMETHING THAT YOU HAVE CONTROL OVER. THERE IS NO EVIDENCE IN THIS CASE THAT THERE IS ANY ORGANIC BRAIN [159]PROBLEM. DR. BOLTER TESTIFIED THAT HE PERFORMED TESTS AND HE FOUND OUT THAT HE MAY HAVE AN ATTENTION HYPERACTIVITY. BUT THIS IS CONDUCT RELATED AND WE ALL HAVE FREE CHOICES. WE ALL HAVE WILLS, AND EITHER WE ABIDE BY THE LAWS IN OUR SOCIETY, THE WAY BETTY SMOTHERS DID AND THE WAY HER CHILDREN DO, OR WE BECOME VICIOUS ANIMALS AND WE PREY ON OTHER PEOPLE. LASTLY IN THIS CASE, THE THIRD AGGRAVATING CIRCUMSTANCE IS PRESENT IN THAT THIS DEFENDANT AND THE ACTIONS OF HIS CODEFENDANT, WHO INCIDENTALLY AND QUITE COINCIDENTALLY I AM SURE WHEN YOU FOUND TODAY THAT TWO OF HIS OTHER AGGRAVATED CRIMES THAT OCCURRED IMMEDIATELY BEFORE THIS MURDER INVOLVED CODEFENDANT WES PAUL. IT INVOLVED THE SECOND CODEFENDANT, MR. HENRI BROADWAY. HE RUNS WITH THE SAME CROWD OF PEOPLE AND THEY ARE PEOPLE WHO ARE MIGHTY HANDY WHEN IT COMES OUT TO PICKING TWO WOMEN WALKING ALONG NORTH BOULEVARD AT NIGHT WHEN THEY'RE ARMED WITH GUNS AND THEY CAN PULL A SAWED-OFF SHOTGUN ON THAT WOMAN AND TELL HER, BITCH, YOU'RE DEAD, WHEN ALL SHE WANTED WAS THE PHOTOGRAPH, THE FUNERAL PHOTOGRAPH OF

HER DECEASED CHILD. MIGHTY HANDY WITH A GUN, A REAL BIG MAN. BUT JUST LIKE THE NIGHT KIMEN LEE AND CORPORAL SMOTHERS WERE PICKED OFF AT CITIZENS BANK AND TRUST, JUST FIVE DAYS BEFORE, TWO OF THE SAME THREE PEOPLE HAD DONE THE SAME THING TO TWO OTHER WOMEN AND YOU COULD LOOK INTO THE FACE OF MS. PERRY AND MS. PERKINS AND SEE, JUST LOOKING AT THEIR FACES AS THEY RECALLED THE DETAILS OF THAT INCIDENT, THAT IS SOMETHING THEY WILL NEVER, NEVER FORGET; ALTHOUGH THEY HAVE LIVED TO AT LEAST COME INTO THIS COURT AND TELL IT, AS DID ANTHONY MILLER, WHO BUT FOR A GUN MISFIRING WHEN IT WAS PUT TO HEAD, WAS ABLE TO COME INTO THIS COURTROOM TODAY AND TELL YOU ABOUT WHAT HAD OCCURRED. HAD THAT GUN FIRED, THERE WOULD HAVE BEEN A SECOND HOMICIDE THAT WOULD HAVE BEEN INVOLVED IN THIS CASE. THE KILLING OF BETTY SMOTHERS WAS – IS A MOST AGGRAVATED FORM [160]OF MURDER BECAUSE OF THE THREE AGGRAVATING CIRCUMSTANCES, BECAUSE OF THE PRE-PLANNING OF THIS CRIME. AND CONSIDERING THE CHARACTER AND PROPENSITIES OF THIS DEFENDANT AS WELL, AS AN ADDITIONAL FACTOR, THAT WAS WHY THE STATE BROUGHT MR. MILLER INTO THE COURTROOM, WHY WE BROUGHT THE OTHER INCIDENT INVOLVING MS. PERRY, AND OF COURSE, IN REBUTTAL WHEN THEY PRESENTED THE TESTIMONY OF THEIR

EXPERT, WHO I SUBMIT TO YOU, DR. GUIN, WAS THAT YOU MAY HAVE WONDERED WHY I ASKED HER THE QUESTION ABOUT THE DEATH PENALTY AND YOU MAY HAVE WONDERED WHY DURING JURY SELECTION I KEPT TELLING YOU THAT YOU WOULD BE THE JUDGES OF THE CREDIBILITY OF WITNESSES, INCLUDING EXPERTS, AND YOU WOULD HAVE THE OPPORTUNITY TO EVALUATE AND TO APPRISE EVEN THE OPINION OF AN EXPERT. BECAUSE YOU MAY FIND THAT EVEN THOUGH SOMEONE HAS A CERTAIN DEGREE, THAT THEIR EXPERT OPINION IS BIASED; PERHAPS BECAUSE OF THEIR OWN FEELINGS OR PERHAPS NOT TAKING INTO ACCOUNT THE ENTIRETY OF A CASE THAT THEY COME INTO COURT AND GIVE YOU A SLANTED VERSION OF WHAT HAS OCCURRED. AND I DON'T MINIMIZE THE CIRCUMSTANCES OF THIS MAN'S GROWING UP. I DO NOT MINIMIZE THAT AT ALL. I DO NOT MINIMIZE THE FACT THAT HE WAS BORN – HAD THIS LOW BIRTH WEIGHT. BUT, LADIES AND GENTLEMEN, IT'S SOMETHING THAT HAPPENS TO MANY PEOPLE. MANY OF US IN THIS COURTROOM, THERE ARE MANY PEOPLE TODAY, AND IF YOU TRULY LOOK BACK INTO EVERYBODY'S CHILDHOOD, THERE ARE MANY OF US WHO PERHAPS DID NOT HAVE THE MOST PLEASANT OF CHILDHOODS, WHO WERE DISCIPLINED, WHO HAVE TALES TO TELL THAT FAR EXCEED ANYTHING, ANYTHING THAT – AND I SUBMIT TO YOU WASN'T EVEN SUBSTANTIATED, WASN'T EVEN SUBSTANTIATED

IN MANY OF THESE CASES. AND IS THIS AN EXCUSE TO GO AND PREY ON OTHER PEOPLE? IS IT AN EXCUSE ON YOUR BIRTHDAY TO TAKE THE LIFE OF A POLICE OFFICER AND REPEATEDLY SHOOT UP ANOTHER YOUNG WOMAN, A WOMAN WHO, ALTHOUGH SHE DIDN'T TESTIFY DURING THE COURSE OF THIS [161] TRIAL, SHE TESTIFIED TO YOU THAT HER LIFE WILL NEVER BE THE SAME. IT HAS NOT BEEN THE SAME SINCE JANUARY THE 7TH OF 1993. THIS MAN HAS A FREE WILL LIKE ANY OF THE REST OF US. HE IS NOT SOMEONE WHO IS RETARDED AND WHEN YOU LOOK TO THE MITIGATING CIRCUMSTANCES, THE JUDGE WILL INSTRUCT YOU AS TO WHAT LEGAL MITIGATION IS. THE FOLLOWING SHALL BE CONSIDERED AS MITIGATING CIRCUMSTANCES: THAT THE OFFENDER HAS NO SIGNIFICANT PRIOR HISTORY OF CRIMINAL CONDUCT. HE WAS A CAREER CRIMINAL BY THE TIME HE WAS NINETEEN. YOU HEARD WHAT WAS NOT TESTIFIED TO YOU DURING THE DEFENSE CASE, THE 1989 INCIDENT INVOLVING THE KILLING OF THE DRUG DEALER AND YOU HEARD THE CONFLICTING VERSIONS THAT HE APPARENTLY GAVE DR. GUIN, AND THE OTHER VERSION IN WHICH HE ADMITTED HIS INVOLVEMENT IN THIS CASE TO BRYAN JORDAN, THE PERSON WHOSE REPORT WAS REPEATEDLY REFERRED TO DURING THE COURSE OF THIS CASE. IN 1989, THE KILLING OF A DRUG DEALER. AND WHAT DO YOU HAVE AFTER THIS? YOU HAVE TWO

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FELONY CONVICTIONS FOR ATTEMPTED POSSESSION OF COCAINE, FELONY THEFT OF A GUN, INCIDENTALLY - COINCIDENTALLY, A WEAPON - THAT HAD OCCURRED PRIOR TO THIS INCIDENT. CHARGES AGAIN FOR WHICH HE HAD ALREADY BEEN CONVICTED, PLED GUILTY TO THREE MONTHS BEFORE THIS MURDER. HE WAS A TWICE-CONVICTED FELON BEFORE HE EVEN TOOK THE LIFE OF BETTY SMOTHERS. HE WAS A CONVICTED FELON, A PERSON PROHIBITED FROM CARRYING A GUN. AND WHAT DID HE DO BEFORE GOING THROUGH HIS SENTENCING, HE WAS OUT AND ON CHRISTMAS DAY GIVING ANTHONY MILLER HIS CHRISTMAS PRESENT, WHICH WAS TO PUT HIM ON HIS KNEES IN EAST FELICIANA PARISH AND PUT THAT GUN TO HIS HEAD AND PULL THE TRIGGER. THAT WAS ANTHONY MILLER'S CHRISTMAS PRESENT FROM KEVAN BRUMFIELD AND I GUESS TRULY HE GOT A PRESENT, BECAUSE HE DIDN'T DIE. AND EIGHT DAYS LATER, WHAT HE DID TO EDNA PERRY ON NORTH BOULEVARD, A SECOND VERY AGGRAVATED ARMED ROBBERY. THE [162] LANGUAGE THAT WAS USED—AND DO YOU DOUBT WHEN YOU HEARD THE LANGUAGE—AND I ASKED MS. PERRY SPECIFICALLY TO TELL ME WHAT HE CALLED HER. YOU HEARD THE WORD BITCH REPEATEDLY. DO YOU REMEMBER ALSO THE TESTIMONY THAT HE CALLED, DURING THE FIRST PORTION OF THIS TRIAL—WHY DID YOU SHOOT? WHEN HE FIRST CAME IN AND HE SAID, I JUST SHOT—JUST KILLED THE

SON-OF-A-BITCH, A SON-OF-A-BITCH. AND THEN THE NEXT DAY WHEN ASKED, WHY DID YOU DO THE KILLING—BITCH LOOKED BACK AT ME. THAT WAS WHAT—IT'S HIS LANGUAGE. IT'S HIS LANGUAGE. BITCH, YOU'RE DEAD. IT'S THE LANGUAGE OF KEVAN BRUMFIELD TOWARDS THE REST OF US THAT LIVE IN SOCIETY, TOWARDS THE REST OF ITS CITIZENS. THAT'S HIS ATTITUDE. NO REMORSE, NO CONSCIENCE. AS LONG AS HE LIVES, OTHERS ARE IN JEOPARDY AND IN DANGER AND YOU SAW THE RECORDS, EVEN. YOU HEARD THE INCIDENT FROM THE PARISH PRISON AND YOU SAW WHAT HE'S DONE. OCTOBER 5TH OF 1993, NOT TEN MONTHS, BARELY TEN MONTHS AFTER TAKING THE LIFE OF CORPORAL BETTY SMOTHERS, SHOOTING HER IN THE BACK OF THE HEAD, TWICE IN THE BACK, THE SHOULDER, SHOOTING HER LIKE HE DID, KILLING HER IN THAT FASHION, BEHIND THE EAR, HE GOES AND HE'S CONVICTED OF BATTERING A POLICE OFFICER AGAIN. ONCE AGAIN, ANOTHER DEFIANCE OF AUTHORITY ON HIS PART. THE DEATH PENALTY—PEOPLE CAN ARGUE AND ASK IF THE DEATH DEFERS – DETERS – AND WE CAN ARGUE ABOUT THAT. IS IT THERE TO PROTECT SOCIETY? YES. IT IS, LADIES AND GENTLEMEN. AND IN THIS CASE, THIS MAN, AS LONG AS HE LIVES AND BREATHES, IS A DANGER AT THE VERY LEAST TO OTHER INMATES AND WHATEVER JAIL HE'S HOUSED IN, HE'S A DANGER TO WHATEVER PEOPLE IN LAW ENFORCEMENT HE WILL BE CONNECTED

WITH. HE HAS ALREADY SHOWN THIS AS HE WAITS FOR A TRIAL ON THIS CHARGE, THAT HE HAS NO REGARD FOR ANYONE ELSE, HE HAS NO REGARD FOR AUTHORITY, HE HAS NO PROBLEM WITH BRUTALIZING AND KILLING POLICE OFFICERS OR BATTERING THEM. [163]BUT MORE IMPORTANTLY, THIS IS NOT A CASE IN WHICH A LIFE SENTENCE IS APPROPRIATE. A LIFE SENTENCE DOES NOT FIT THIS MAN, THIS KILLER, THIS CAREER CRIMINAL AT HIS AGE. IT IS ONE THAT TO GIVE A LIFE SENTENCE IN THIS CASE IS BASICALLY FOR BETTY SMOTHERS' LIFE TO HAVE HAD NO MEANING, NO MEANING AND PURPOSE WHATSOEVER. HE HAS AN EXTREMELY SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONDUCT. A SECOND MITIGATING FACTOR IS THAT THE OFFENSE WAS COMMITTED WHILE THE OFFENDER WAS UNDER THE INFLUENCE OF EXTREME EMOTIONAL OR EMOTIONAL - MENTAL OR EMOTIONAL DISTURBANCE. THERE IS NOT ONE SHRED OF EVIDENCE PRESENTED TO THIS - TO THIS EFFECT. THERE IS NO TESTIMONY THAT HE HAS ANY PROBLEMS EXCEPT CONDUCT-RELATED DISORDERS, HYPERACTIVITY. THERE HAS BEEN NO TESTIMONY, NO EVIDENCE PRESENTED THAT AT THE TIME OF THIS EVENT, WHICH HE APPARENTLY STILL DENIES, THAT HE HAD ANY KIND OF EMOTIONAL OR MENTAL DISTURBANCE. A MITIGATING CIRCUMSTANCE IS LIKEWISE THAT THE OFFENDER WAS UNDER THE INFLUENCE OR THE DOMINATION OF ANOTHER

PERSON. THERE IS NO EVIDENCE IN THIS CASE. HE IS PRESENT IN EACH OF THESE SITUATIONS. KEVAN BRUMFIELD IS THERE, SHOOTING, DOING THE MAIN KILLING AT THE TIME BETTY SMOTHERS IS KILLED. HE IS CERTAINLY NOT UNDER THE DOMINATION OF ANYBODY ELSE. HE'S ALWAYS THERE. IT JUST HAPPENS THAT WES PAUL OR HENRI BROADWAY HAPPENS TO BE HIS SECOND BACKUP MAN WHENEVER ELSE HE'S PRESENT. THIS MITIGATING CIRCUMSTANCE IS NOT PRESENT IN THIS CASE. A FOURTH MITIGATING CIRCUMSTANCE LISTED BY LAW IS THAT THE OFFENSE WAS COMMITTED UNDER CIRCUMSTANCES WHEN THE OFFENDER REASONABLY BELIEVED THAT HIS CONDUCT HAD MORAL EXTENUATION OR JUSTIFICATION. HE HAD NO RIGHT TO TAKE THIS WOMAN'S LIFE. HE HAD NO BELIEF THAT HE HAD ANY REASON TO DO THIS. THIS MITIGATING CIRCUMSTANCE HAS NO APPLICATION TO THIS CASE. WAS THERE A MENTAL DISEASE OR DEFECT OR INTOXICATION AT THE TIME OF THIS CRIME THAT WOULD [164] HAVE PREVENTED HIM FROM CONFORMING HIS BEHAVIOR TO THE REQUIREMENTS OF LAW? THERE IS NO TESTIMONY IN THIS CASE THAT HE WAS UNDER THE INFLUENCE OF EITHER DRUGS OR ALCOHOL OR THAT HE HAD A MENTAL DISEASE OR A DEFECT. ONCE AGAIN, AT BEST, HE HAD A CONDUCT-RELATED DISORDER. WAS HE A PRINCIPAL WHOSE PARTICIPATION WAS RELATIVELY MINOR? I SUBMIT TO YOU NOT. HE WAS THE PERSON WHO DID THE ACTUAL

KILLING AT THE TIME OF THIS CRIME. THIS MITIGATING CIRCUMSTANCE WOULD NOT APPLY. THE ONLY POSSIBLE CONCEIVABLE CIRCUMSTANCE TO MITIGATION THAT YOU COULD EVEN LOOK AT IN THIS CASE IS THE YOUTH OF THE PERSON AT THE TIME OF THE OFFENSE, AND AS I TOLD YOU DURING THE JURY SELECTION PROCESS, WHETHER YOU CONSIDER YOUTH TO BE PRESENT IN A CASE OF A PERSON WHO IS TWENTY YEARS OLD AT THE TIME HE COMMITS THIS MURDER, DO YOU CONSIDER THAT TO BE YOUTH GIVEN HIS HISTORY OF CRIMINAL CONDUCT. AND IF YOU DO CONSIDER HIM TO BE YOUTHFUL, DO YOU CONSIDER THIS TO BE SUFFICIENT MITIGATION FOR THIS JURY NOT TO IMPOSE THE PENALTY OF DEATH, GIVEN THE MAGNITUDE OF WHAT HE DID ON JANUARY THE 7TH OF 1993, BOTH TO KIMEN LEE, TO CORPORAL BETTY SMOTHERS, TO HER SIX CHILDREN, TO HER MOTHER, TO ANTHONY MILLER AND TO EDNA PERRY? I SUBMIT TO YOU, LADIES AND GENTLEMEN, IN THIS CASE IT IS CLEAR THAT THE APPROPRIATE PENALTY TO FIT THIS DEFENDANT AND HIS DEFIANT ACT OF MURDER IS THE PENALTY OF DEATH. THANK YOU.

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APPENDIX G — CLOSING ARGUMENT OF THE DEFENSE, EXCERPT OF TRANSCRIPT OF SENTENCING HEARING OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, CRIMINAL SECTION I, DATED JULY 3, 1995

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION I

NUMBER: 1-93-865

STATE OF LOUISIANA

VS.

KEVAN BRUMFIELD

TRANSCRIPT OF
SENTENCING HEARING

MONDAY, JULY 3, 1995

THE HONORABLE RALPH E. TYSON,
JUDGE PRESIDING

* * *

[165]CLOSING ARGUMENT

Appendix G

BY MR. BROWN:

LADIES AND GENTLEMEN OF THE JURY, DURING VOIR DIRE WE SPOKE OF LIFE VERSUS THE DEATH PENALTY. AT THAT TIME I TOLD YOU THAT YOU'RE NEVER REQUIRED TO IMPOSE THE DEATH PENALTY, EVEN IF YOU BELIEVE THAT THE STATE HAS PROVED ITS CASE, THE STATE HAS PROVED THE EXISTENCE—IN ITS CASE IN CHIEF, REALLY, BECAUSE OF THE POLICE OFFICER, ARMED ROBBERY—YOU WOULD HAVE HAD TO BELIEVE THAT IN ORDER TO CONVICT KEVAN OF THIS CRIME THAT YOU'RE NEVER REQUIRED TO IMPOSE THE DEATH PENALTY. YOU CAN ONLY DO SO IF YOU FEEL THAT IT'S AN APPROPRIATE PENALTY. I SUBMIT TO YOU THAT TWO WRONGS DON'T MAKE A RIGHT. I HAVE NOTHING BUT SYMPATHY FOR THE SMOTHERS FAMILY AND I SEE THE KIDS THERE AND THEY'RE HURT. I SEE THE MOTHER OF CORPORAL SMOTHERS WHO HAS A VERY HEAVY BURDEN AND SHE—I'M SURE SHE DIDN'T EXPECT TO HAVE THAT BURDEN EVER AGAIN. BUT THEN, YOU SEE ON THE OTHER SIDE OF THE COURTROOM, YOU SEE KEVAN BRUMFIELD'S FAMILY. THEY HAVE HURT. IN THE LAP OF KEVAN BRUMFIELD'S MOTHER LIES KEVAN BRUMFIELD'S FIVE-YEAR-OLD DAUGHTER. IT'S SAID TO ME THAT MURDER LIVES, NOT ONLY LIVES WITH THE VICTIMS, BUT IT LIVES WITH THE FAMILY OF THE PERSON CONVICTED OF THE CRIME. SO NOT ONLY ARE YOU GOING TO

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AFFECT KEVAN BRUMFIELD BY THE DEATH PENALTY, YOU'RE GOING TO AFFECT HIS FAMILY, YOU'RE GOING TO AFFECT THE KIDS THAT WILL NEVER SEE HIM AGAIN. IT'S ONLY FAIR THAT IF YOU DO THIS THAT YOU KNOW WHAT YOU'RE DOING, THAT IT'S A CONSIDERED DECISION THAT YOU MAKE. LIFE IMPRISONMENT IS LIFE IMPRISONMENT. HE'LL NEVER GET OUT. IT'S WITHOUT BENEFIT OF PAROLE, PROBATION, SUSPENSION OF SENTENCE. RISK TO SOCIETY IS GONE. WHAT'S THE PURPOSE? ANTHONY MILLER CAME UP HERE AND HE TALKED ABOUT AN ARMED ROBBERY HIMSELF. HE CAME IN PRISON ORANGE. HE'S ADMITTED THAT HE HAD A CRIMINAL RECORD [166]AND I ASKED HIM WHETHER OR NOT HE PULLED A GUN ON KEVAN BRUMFIELD. I DIDN' T REALLY EXPECT THAT HE WAS GOING TO ADMIT THAT HE DID. EDNA PERRY AND TRINA PERKINS, THEY CAME HERE AND THEY—BOTH OF THEM ADMITTED TO KNOWING HENRI BROADWAY AS A CHILD AND THEN THE PROBLEMS COME IN THAT—WHETHER OR NOT THEY RECOGNIZED HENRI BROADWAY THE NIGHT THAT THEY SAID THAT THEY WERE ROBBED. ISN'T IT A STRANGE COINCIDENCE THAT THEY ONLY RECOGNIZED THAT IT WAS THAT HENRI BROADWAY THAT THEY KNEW AS A CHILD WHO USED TO DANCE WITH THEIR BROTHER THAT THEY—ONE OF THEM CONSIDERED—I THINK BOTH OF THEM AT ONE TIME OR THE OTHER ADMITTED THAT THAT WAS, SO TO SPEAK, A FRIEND OF THEIR

BROTHER. ISN'T IT A STRANGE COINCIDENCE THAT THEY ONLY RECOGNIZED THAT TO BE THE HENRI BROADWAY THAT THEY KNEW WHEN HE WAS ARRESTED IN REGARD TO THIS MATTER? KEVAN WAS NEVER ARRESTED IN REGARD TO THAT ALLEGED ARMED ROBBERY OF TRINA PERKINS—OF EDNA PERRY AND TRINA PERKINS. MS. BURNS REFERRED TO A 1989 SHOOTING REGARDING A DRUG DEAL. THAT'S A CASE WHERE KEVAN TURNED STATE'S EVIDENCE. HE TESTIFIED AGAINST THE PERSON THAT DID THE SHOOTING.

MS. BURNS: JUDGE. I'M GOING TO OBJECT. THAT IS NOT TRUE AND IT IS NOT IN EVIDENCE. BUT IT IS NOT TRUE.

THE COURT: APPROACH THE BENCH.

REPORTER'S NOTE: COUNSEL FOR THE STATE, MS. BURNS, AND BOTH COUNSEL FOR THE ACCUSED APPROACHED THE BENCH FOR A CONFERENCE WITH THE COURT, OUT OF THE HEARING OF THE JURY, AND THE MATTER RESUMED AS FOLLOWS:

MR. BROWN: YOUR HONOR, THIS IS CLOSING. DR. GUIN TESTIFIED THAT KEVAN TESTIFIED TO THOSE FACTS REGARDING THE SHOOTING.

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THE COURT: HER TESTIMONY IS IN EVIDENCE ONLY [167]AS MENTIONING THE INCIDENT. NEITHER HER NOR THE OTHER DR. TESTIFIED AS TO ANYTHING ABOUT THE DETAILS OF THE INCIDENT. YOU CAN ARGUE—

MR. BROWN: THAT IS THE DETAILS, YOUR HONOR.

THE COURT: SHE DIDN'T TESTIFY ABOUT THE DETAILS.

MR. BROWN: BUT SHE SAID HE TESTIFIED.

THE COURT: DR. GUIN DIDN'T SAY ANYTHING ABOUT HIM SAYING THAT HE TURNED STATE'S EVIDENCE.

MR. BROWN: BUT HE WAS NEVER CONVICTED OF THIS.

THE COURT: YOU CAN ARGUE THE ABSENCE OF THE CONVICTION, BUT YOUR ARGUMENT ABOUT TURNING STATE'S EVIDENCE IS BEYOND THE SCOPE AND IT'S IMPROPER. SUSTAINED.

MR. BROWN: NOTE OUR OBJECTION.

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REPORTER'S NOTE: THIS MATTER RESUMED AS FOLLOWS WITH ALL PARTIES REMAINING PRESENT IN THE COURTROOM:

BY MR. BROWN:

KEVIN WAS NEVER CONVICTED IN REGARD TO THIS 1989 SHOOTING THAT MS. BURNS SPEAKS OF AND—AND-AND SHE SPEAKS IN REGARD TO INFORMATION THAT'S CONTAINED IN DR. GUIN'S REPORT, AND ISN'T IT INTERESTING THAT SHE SAYS THAT DR. GUIN IS A BIASED EXPERT AND SHE IS ABLE TO PULL INFORMATION WHICH IS PERCEIVED AS DEROGATORY TOWARDS KEVAN FROM THE REPORTS OF DR. GUIN, DR. BOLTER, AND—AND DR. JORDAN, ALL PEOPLE THAT THE DEFENSE HAD TO EXAMINE KEVAN BRUMFIELD. THAT INFORMATION WAS GLEANED FROM THE REPORTS THAT WE PROVIDED MS. BURNS. SO THE QUESTION THAT'S PRESENTED TO YOU: ARE WE TRYING TO GET THE SLANTED SIDE OF THE STORY? WE NEVER SAID THAT KEVAN HAS BEEN A CHOIR BOY. WE ALWAYS ACKNOWLEDGED THAT THERE WERE THE [168] CRIMINAL PROBLEMS, THE PROBLEMS THAT BEGAN AT AN EARLY AGE. WHAT WE DID TRY TO PROVIDE TO YOU WERE THE WHOLE FACTS; THAT KEVAN WAS BORN TWO AND A HALF OR THREE AND A HALF POUNDS, VERY LOW BIRTH WEIGHT, AND HIS PROBLEMS BEGAN FROM THERE. WE TRIED TO EXPLAIN TO YOU WHAT

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THAT LOW BIRTH WEIGHT MEANT IN TERMS OF NEUROLOGICAL PROBLEMS AND ITS SUBSEQUENT SOCIAL PROBLEMS. MS. BURNS TESTIFIED THAT THERE WAS NO ORGANIC BRAIN DAMAGE AND NO NEUROLOGICAL PROBLEMS. THAT'S NOT WHAT DR. BOLTER SAID. DR. BOLTER SAID THERE WERE SOME ORGANIC MEMORY PROBLEMS, ATTENTION DEFICIT, A BORDERLINE I.Q., AND WHEN ASKED WHETHER THAT—THOSE PROBLEMS WHICH OCCURRED FROM BIRTH, BECAUSE OF NO FAULT OF KEVAN, COUPLED WITH ADDITIONAL SOCIAL PROBLEMS, AND THOSE SOCIAL PROBLEMS INCLUDE THINGS LIKE THE EXISTENCE OF SIX FATHER, STEPFATHERS, IN AND OUT OF HIS LIFE AT A VERY YOUNG AGE, THE PLACEMENT INTO FOURTEEN SCHOOLS, IN AND OUT OF DIFFERENT SCHOOLS, BEING BOUNCED BACK AND FORTH FROM ONE PLACE TO THE OTHER, BEING PLACED IN GROUP HOMES FROM THE AGE OF TWELVE, BEING BOUNCED BACK AND FORTH TO SIX DIFFERENT GROUP HOMES, THE TYPE OF MEDICATION THAT HE RECEIVED AT A YOUNG AGE. DR. BOLTER GOT UP AND TESTIFIED AS TO—TO THE STRENGTH OF THORAZINE AND MELLARIL, ANTIPSYCHOTIC MEDICINE THAT KEVAN WAS GIVEN WHILE AT MARGARET DUMAS AND WHILE AT ANOTHER MENTAL HEALTH FACILITY. KEVAN HAD PROBLEMS FROM THE VERY OUTSET. AND THE POINT OF WHAT WE WERE SAYING IS THAT ALL THOSE PROBLEMS ADDED UP, NOT ONE INDEPENDENT

OF THE OTHER. A CULMINATION OF A LOT OF THINGS BROUGHT KEVAN TO THE STATE IN WHICH HE IS RIGHT NOW, RIGHT WHERE HE IS RIGHT NOW. AND WE TALKED ABOUT ABUSE IN THE HOME, AND AGAIN, MS. BURNS GOES OVER THE—THE MITIGATION FACTORS IN—IN THE BOOK, AND AGAIN, WHEN WE WERE INVOLVED IN THE SELECTION PROCESS WE ALL DISCUSSED THAT YOU CAN CONSIDER ANY RELEVANT MITIGATING CIRCUMSTANCE, THINGS THAT YOU CONSIDER RELEVANT TO [169]THE RELEVANCE OF KEVAN'S LIFE, IN TERMS OF SEEING WHETHER, YOU KNOW, THINGS WERE—GOT TO A POINT THAT THEY WERE BEYOND HIS CONTROL AND THAT HAS TO DO WITH HIS BACKGROUND. THAT HAS TO DO WITH THE ABUSE OF HIS STEPFATHER UPON A CHILD THAT WAS BORN WITH PROBLEMS TO BEGIN WITH; A CHILD THAT HAS PROBLEMS DEALING WITH A BREAKUP OF HIS MOTHER; A CHILD THAT HAD A MOTHER THAT WAS FROM AN ABUSIVE HOME; AND AS DR. GUIN TESTIFIED, HAD AN EMOTIONAL DETACHMENT FROM THE CHILDREN, THROUGH NO FAULT OF HER OWN, AND THAT—THAT DETACHMENT IS RELATED TO THE ABUSE THAT SHE SUFFERED HERSELF; A FATHER WHO WAS—WHO CARED FOR KEVAN AND HIS BROTHER BUT WAS UNABLE AT THAT POINT, BECAUSE OF THINGS IN HIS LIFE, TO GIVE THEM THE ATTENTION THAT THEY NEEDED, THE DIRECTION THAT THEY NEEDED. THEY ARE ALL IN HERE AND THEY HAVE TO DEAL WITH THE

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DIFFICULTIES OF REHASHING THE PROBLEMS OF KEVAN'S LIFE AND IT'S NOT EASY—AN EASY THING TO STAND UP HERE AND HAVE TO SAY THESE THINGS WHILE THEY SIT OVER THERE, AND FOR THEM TO HAVE TO SIT UP THERE AND TO HAVE TO LISTEN IT. I'M GOING TO ASK YOU TO CONSIDER WHAT USEFUL BENEFIT IT IS GOING TO HAVE FOR YOU OR FOR OUR SOCIETY TO PUT KEVAN TO DEATH. IS IT—DO YOU THINK IT BENEFITS; IS IT A RELEASE OF THE ANGER THAT YOU—OF THE REPULSION THAT YOU FEEL FOR THE DEATH OF CORPORAL SMOTHERS? BECAUSE THAT RELEASE OF ANGER I[illegible] NOT GOING TO BRING CORPORAL SMOTHERS BACK TO HER CHILDREN AND TO HER MOTHER. IS THIS SOME VINDICATION OF THE ANGER THAT THEY FEEL FOR KEVAN BRUMFIELD? MAYBE IT IS. THAT VINDICATION OF THEIR ANGER ALSO AFFECTS KEVAN BRUMFIELD'S MOTHER, FATHER, CHILDREN, HIS BROTHERS, UNCLES, HIS AUNTS. SO THE DEATH OF CORPORAL SMOTHERS IS THE AFFECTING, NOT ONLY OF THE SMOTHERS CHILDREN, BUT THE AFFECTING OF DIFFERENT FAMILIES HERE. THERE ARE LOTS OF VICTIMS HERE. THE VICTIMS ARE NOT ONLY ON ONE SIDE OF THE COURTROOM. WHAT ARE THE BENEFITS OF LIFE [170]IMPRISONMENT? A FATHER TO A KID IS BETTER THAN NO FATHER AT ALL. ALTHOUGH KEVAN MAY NEVER SEE THE LIGHT OF DAY AGAIN, IT'S A DIFFERENT THING FOR A CHILD TO BE ABLE TO AT LEAST SEE WHO THEIR NATURAL FATHER IS. HOW DOES

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CHILDREN—HOW DOES A CHILD UNDERSTAND THAT THEIR FATHER WAS PUT TO DEATH BY THE STATE? I WOULD IMAGINE IT'S DIFFICULT TO UNDERSTAND ANY KIND OF DEATH OF A PARENT BY ANYTHING OTHER THAN NATURALLY. BUT TO SAY THAT IT WAS—HE WAS LAWFULLY PUT TO DEATH BY THE STATE MUST BE A VERY VERY DIFFICULT THING TO HAVE TO EXPLAIN TO A CHILD. SO I ASK YOU IN YOUR CONSIDERATION NOT TO ONLY THINK OF KEVAN BRUMFIELD. MAYBE WHEN YOU THINK OF KEVAN BRUMFIELD, IT'S A LOT EASIER TO DO. WHEN YOU THINK ABOUT THIS, YOUR DECISION, ALSO THINK ABOUT THE OTHER PEOPLE THAT IT AFFECTS. THERE ARE SO MANY ARGUMENTS THAT GO INTO WHETHER A LIFE SENTENCE OR THE DEATH PENALTY IS APPROPRIATE. THERE ARE SO MANY PROPONENTS OF THE DEATH SENTENCE THAT SAY AN EYE FOR AN EYE. WELL, I SUBMIT TO YOU THAT IT'S NOT GOING TO STOP THE PROBLEM OF CRIME IN OUR SOCIETY. LET'S TAKE KEVAN FOR INSTANCE, ALL THE PROBLEMS THAT HE EXPERIENCED EARLY IN LIFE. WHERE WAS SOCIETY WHEN HE MADE ALL THOSE CALLS? WHERE WAS SOCIETY WHEN HE WAS BEING ABUSED BY HIS STEPFATHER? MARK TWAIN SAID THAT AN EASY ANSWER IS ALWAYS THE WRONG SOLUTION. OR HE MAY HAVE SAID THAT, SO TO SPEAK, IN A DIFFERENT MANNER. THE DEATH PENALTY IS AN EASY ANSWER BUT THE WRONG SOLUTION. THE SOLUTION IS MORE COMPLICATED BECAUSE

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WE'VE HAD THE DEATH PENALTY FOR A LONG TIME AND THE PROBLEMS JUST KEEP GETTING WORSE. THE EXAMPLE YOU SET BY ADMINISTERING THE DEATH PENALTY IS TO SAY TO THE PEOPLE THAT SURVIVE ON THE OTHER SIDE OF THE FENCE—WHAT DOES IT SAY TO THE PEOPLE THAT SURVIVE CERTAIN SOCIETAL ILLS? ARE YOU SAYING YOU CARE FOR THOSE CHILDREN, THE BRUMFIELDS, THE PARENTS OF KEVAN BRUMFIELD? THEY DIDN'T HAVE ANYTHNG TO DO [171]WITH THIS CRIME. ARE YOU SAYING THAT YOU CARE ABOUT THEM? ARE WE A SOCIETY THAT CARES ABOUT PEOPLE? MAYBE THAT'S PART OF THE PROBLEM. THIS IS A HIGHLY PUBLICIZED MATTER. I BELIEVE MOST ALL OF YOU HAVE INDICATED THAT YOU HEARD MEDIA REPORTS, NEWS REPORTS OF THIS EVENT. IT INVOLVES A BRUTAL DEATH OF A BATON ROUGE POLICE OFFICER, A MOTHER OF SIX, AND EVERYONE'S HEART WENT OUT TO THAT MOTHER, AS IT SHOULD. EFFORTS WERE MADE. THE COMMUNITY DEVELOPED AND CAME TOGETHER AND I BELIEVE THESE—THE CHILDREN OF CORPORAL SMOTHERS CAN ATTEST TO THE OUTPOURING OF SYMPATHY THAT THEY RECEIVED FROM THE WEALTH OF THEIR COMMUNITY, ALL IN THE TIME OF THE DEATH OF THEIR MOTHER. AND I SAY THAT AND I TRY TO SAY IT IN A WAY THAT YOU GET THE TRUE MEANING OF WHAT I'M SAYING. IT'S THAT THERE ARE KIDS THAT ARE HURTING ALL THE TIME, EARLY ON IN AGE, THAT WE DON'T HEAR

THEIR SUFFERING, BECAUSE IT DOESN'T TOUCH YOU, TOUCH US, IN THE WAY THE KILLING OF CORPORAL SMOTHERS TOUCHED THE COMMUNITY. THE SUFFERING THAT GOES ON IS DEEP. THE SUFFERING CAUSES PROBLEMS. AND IF WE ARE TO BEGIN TO ADDRESS THE PROBLEMS OF KIDS THAT GROW UP LIKE KEVAN, WHICH—HIS FOURTH GRADE TEACHER GOT ON THE STAND. SHE KNEW HIM AS A CHILD. HE READILY ADMITTED THAT THERE WERE PROBLEMS EVEN THEN. THERE WERE GOOD SIDES TO KEVAN. IN HER OWN WORDS, THAT HE WOULD ALWAYS TAKE UP FOR THE UNDERDOG. THE POINT OF ALL OF THIS IS THAT THINGS ARE NOT ALWAYS BLACK AND WHITE. AS MUCH AS PEOPLE WOULD LIKE TO RUSH INTO THEIR INITIAL IMPRESSIONS AND INITIAL REACTIONS, THEIR EMOTIONS OF ANGER, MOST OFTEN, I SUBMIT MOST PROBABLY, THAT'S NOT THE RIGHT THING TO DO. AS I DID, WHEN I WAS A YOUNG PERSON, AND MY AUNT STELLA WAS KILLED BY MY UNCLE GEORGE, I FELT ASHAMED BECAUSE OF THAT. I'M JUST GLAD I HAD MY FATHER WHO WAS THINKING MORE CLEARLY. BECAUSE I KNOW A LOT OF PEOPLE WOULDN'T HAVE FELT LIKE THAT. SO I JUST ASK THAT YOU [172]CONSIDER THAT SOMETHING WAS JUST NOT QUITE RIGHT WITH KEVAN AT BIRTH AND IT WASN'T HELPED BY THE FACT THAT HE HAD SIX STEPFATHERS IN AND OUT OF THE HOUSE AT A YOUNG AGE. HE HAD AN EXTREMELY ABUSIVE STEPFATHER, STEPFATHER NUMBER FOUR,

WHO ADMINISTERED—WHO WOULD HAVE FLASHBACKS. HE ADMINISTERED BRUTAL PUNISHMENTS TO KEVAN AND HIS BROTHER TEODIS, IN METHODS THAT WERE OUTRAGEOUS; HOT RICE, BOOKS ACROSS THE HEAD. THAT'S IN THE HOME. AND THEN YOU PUT THE KID IN SCHOOL AND YOU EXPECT TO DEAL WITH THIS; THE PROBLEMS AT BIRTH, THE PROBLEMS THAT HE ALREADY HAS TO DEAL WITH. WE TALKED ABOUT PROBLEMS HE HAD IN SCHOOL, PUTTING HIM INTO A SPECIAL CLASS, AND YOU HEARD THAT ONCE HE GOT CLASSIFIED INTO A BEHAVIORAL DISORDER CLASS THAT HE BEGAN TO DO BETTER AND HIS TEACHER IN THAT CLASS, THE FIFTH GRADE, STATED THAT HE WAS THE BEST BEHAVED OF ALL THE KIDS HE HAD IN THAT CLASS, A STRUCTURED ENVIRONMENT, A MORE OF A ONE ON ONE SORT OF ENVIRONMENT. YOU HEARD THAT KEVAN HAS HAD DISCIPLINE REPORTS; ONE FOR FIGHTING AND MINOR SUCH THINGS IN THE PARISH PRISON, WHICH WAS AT A LEVEL, RELATIVELY HIGH RATED LEVEL, WHEN HE FIRST ENTERED INTO PRISON FOR THIS CHARGE AND HAS STEADILY AND SUBSTANTIALLY DECREASED UP UNTIL THIS POINT. AGAIN, DR. BOLTER DIDN'T SAY THAT HE DIDN'T HAVE ANY NEUROLOGICAL PROBLEMS. IN FACT, HE SAID HE DID, AND DR. BOLTER ADMITTED THAT THOSE PROBLEMS, COUPLED WITH ALL THE THINGS THAT HE HAD TO DEAL WITH; A KID BORN UNDER THE CIRCUMSTANCES OF KEVAN'S,

HIS BIRTH WEIGHT, ALONG WITH OTHER PROBLEMS, THOSE SORT OF THINGS LEAD A CHILD TO AN ANTISOCIAL BEHAVIOR. THAT'S HOW IT HAPPENS AND THAT'S HOW THIS HAPPENED. THERE'S AN EXPLANATION THAT BEGAN THROUGH NO FAULT OF KEVAN'S. AND AGAIN, TO IMPOSE THE DEATH PENALTY IS NO SOLUTION TO THE PROBLEM THAT YOU SEE HERE. BUT TO IMPOSE THE DEATH PENALTY WOULD IMPOSE FURTHER HURT UPON THE FAMILY OF [173]KEVAN BRUMFIELD, ON THOSE CHILDREN, AND THEY HAVEN'T DONE ANYTHING. AND THERE'S REALLY NO VINDICATION TO THE SMOTHERS FAMILY BECAUSE IT WILL NEVER BRING THEIR MOTHER BACK. THANK YOU.

[174]REBUTTAL CLOSING ARGUMENT

BY MS. BURNS:

THE PURPOSE OF SENTENCE IS TO RENDER A PUNISHMENT THAT FITS THE CRIME AND THE KILLER. IN THIS CASE THE ONLY REASON THAT THE TWELVE OF YOU, AS THE JURORS, ARE IN THIS COURTROOM IS BECAUSE OF KEVAN BRUMFIELD. IT IS NOT BECAUSE OF ANYONE ELSE. IT IS NOT BECAUSE OF A LOW BIRTH WEIGHT; IT IS NOT BECAUSE OF DISCIPLINE IN THE HOME. HE IS A PERSON WITH FREE CHOICE AND FREE WILL, AND GRADUALLY, THROUGH HIS ADULT LIFE, HE HAS MOVED CLOSER TO

THIS COURTROOM. IN 1989 WHEN THE DRUG DEALER WAS KILLED HE WAS INCHING HIS WAY TOWARDS THIS JURY. ON DECEMBER THE 25TH, 1992 WHEN HE TOOK THAT GUN, ROBBED ANTHONY MILLER, PULLED THE TRIGGER OF THE GUN, HE GOT CLOSER TO BEING IN FRONT OF THIS JURY IN THE POSITION THAT HE'S NOW IN. ON JANUARY THE 2ND OF 1993, WHEN HE TOOK A SAWED-OFF SHOTGUN AND POINTED IT AT EDNA PERRY AND ROBBED THAT WOMAN, HE GOT CLOSER TO THIS JURY, AND HIS FINAL ACT OF DEFIANCE, CULMINATED ON JANUARY THE 7TH OF 1993, WHEN HE SNATCHED THAT MOTHER AND THAT DAUGHTER AND THAT POLICE OFFICER, THAT PERSON IN OUR COMMUNITY, AWAY FROM ALL OF US. HE IS THE ONLY REASON THAT THIS JURY IS REQUIRED TO RENDER A PUNISHMENT IN THIS CASE. THE LAW PROVIDES FOR TWO PUNISHMENTS; PUNISHMENT THAT FITS THE CRIME AND FITS THE KILLER. IN THIS CASE, LADIES AND GENTLEMEN OF THE JURY, HE HAS BEEN IN CONTROL ALL OF HIS LIFE. HE HAS BEEN THE ONE WHO HELD THE GUNS ON OTHER PEOPLE. HE HAS BEEN THE ONE WHO HAS VICTIMIZED THEM. HE HAS BEEN THE ONE WHO CONTROLLED THE LIFE OF BETTY SMOTHERS AND TOOK THE LIFE OF BETTY SMOTHERS WITH HIS FIVE SHOTS INTO HER HEAD AND HER BACK. HE HAS CONTROLLED THE SITUATION UP UNTIL NOW. THE LAW PROVIDES THAT AN APPROPRIATE PENALTY SHALL BE RETURNED; A PENALTY THAT FITS

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THE CRIME AND THE KILLER. IN THIS CASE, A SENTENCE OF LIFE IMPRISONMENT GIVES NO MEANING TO THE WORDS [175]OF THE LAW. IT GIVES NO MEANING TO THE LIFE OF CORPORAL BETTY SMOTHERS. I SUBMIT TO THIS JURY THAT THERE MAY HAVE BEEN AN OUTPOURING OF SYMPATHY FOR THESE CHILDREN IN THIS COMMUNITY, BUT WILL THAT EVER MAKE UP FOR THE TOUCH, THE HUG OF A MOTHER, THE COMFORT OF A MOTHER WHEN THOSE YOUNG CHILDREN ARE SICK, WHEN THEY'RE SAD, WHEN THEY NEED TO TALK WITH SOMEONE, WHEN THEY NEED LOVE AGAIN? IT WILL NOT. NOTHING CAN EVER BRING BETTY SMOTHERS BACK. BUT THERE CAN BE SOME MEANING TO HER LIFE AND TO HER DEATH IN THIS CASE. THE STATE OF LOUISIANA ASKS THIS JURY TO RETURN THE ONLY PROPER APPROPRIATE PENALTY IN THIS CASE AND THAT IS THE SENTENCE OF DEATH. WE ASK YOU FOR THAT VERDICT.

APPENDIX H — EXCERPT OF PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED MARCH 25, 2000

19TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DEATH CASE

Docket No. 1-93-865
Criminal Section 1
Division B

STATE OF LOUISIANA
ex rel. KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

Filed: Deputy Clerk:

Petition for Post-Conviction Relief

Kevan Brumfield ("Brumfield") petitions for post-conviction relief to have his conviction of first degree murder and his sentence of death set aside. In support, he states as follows.

* * *

(p) As long as he is insane, Brumfield cannot be executed. In no event should a warrant for Brumfield's execution be issued without a medical examination of Brumfield for sanity that was conducted (i) no more than 60 days and no less than 30 days prior to the issuance of such warrant, (ii) with adequate prior notice to undersigned counsel, and (iii) with a reasonable opportunity for undersigned counsel to select and have an independent medical doctor view such examination and conduct or have conducted his or her own independent examination within 20 days after the initial examination.

33. Because the trial judge who presided over Brumfield's criminal case is no longer a member of this court, this court cannot resolve any factual disputes about the trial without an evidentiary hearing.

34. This petition is a properly filed application for State post-conviction or other collateral review within the meaning of 28 U.S.C. § 2444(d).

35. From the time of his arrest in 1993 to the present date, Brumfield has been both incarcerated and indigent.

36. Under Louisiana statutory law and jurisprudence and otherwise, Brumfield is entitled to sufficient time and funds for his counsel to investigate the facts, to develop claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts (including without limit for neurological studies of Brumfield's head, for neurologists, psychiatrists,

and other medical doctors to review Brumfield's medical records and to examine his person, an expert on the use of hypnosis-induced testimony, and a criminologist). Until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.

37. Because undersigned counsel were appointed only recently by the Louisiana State Bar Association's Committee on Post-Conviction Representation to represent Brumfield, have not been provided funds for retaining any experts or otherwise, and because the Supreme Court's Clerk has not located one of the two boxes of evidence admitted at trial and undersigned counsel have not yet otherwise located and obtained these exhibits or the expert reports used and referred to at trial, undersigned counsel have not had adequate time, resources, or ability to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside. Thus, Brumfield reserves all rights to amend and supplement this petition. To this end, undersigned counsel intends within 120 days to further elaborate on the allegations above (including with detailed record citations, affidavits, and other appropriate evidence).

38. By filing this petition, undersigned counsel do not waive any claims for reimbursement of expenses, costs, or fees that they may incur or advance.

* * * *

APPENDIX I — BRUMFIELD'S EXPEDITED MOTION FOR ORDER ON PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED MARCH 25, 2000

19TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DEATH CASE

Docket No. 1-93-865
Criminal Section I
Division B

STATE OF LOUISIANA
ex rel. KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

Filed: Deputy Clerk:

Brumfield's Expedited Motion for Order on Petition for Post-Conviction Relief

Petitioner Kevan Brumfield ("Brumfield") moves this court on an expedited basis for an order that his accompanying petition for post-conviction relief ("Petition") is "a properly filed application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), that he may amend and supplement his Petition within 120 days (or such later fixed date as

the court may hereafter set), and that this court will not dismiss or deny any or all parts of his Petition until after he has had an opportunity to amend his Petition within such 120-day (or later fixed) time period.

1. This is a capital case. The United States Supreme Court has admonished lower courts that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

2. Proceedings for post-conviction relief in Louisiana are authorized and governed by statutory and court rules. *See* La. C.Cr.P. arts. 924-930.8; La. Sup. Ct. Rule XXVII; *State ex rel. Tassin v. Whitley*, 602 So.2d 721 (La. 1992).

3. Petitioner wishes to avail himself of these remedies for post-conviction relief. Petitioner, who is indigent, requires the assistance of experts, funds with which to secure that assistance, and time for counsel to develop his claims for relief and the facts in support of those claims.

4. Undersigned counsel were only recently appointed by the Louisiana State Bar Association's Committee on Post-Conviction Representation to represent petitioner and thus are still in the process of obtaining trial materials and reviewing the record and have not had sufficient time to fully research and develop claims or to investigate facts or even to fully determine what expert assistance may be needed.

5. Certain Louisiana courts have expressed concern that petitions for post-conviction relief should be filed before any preliminary litigation about funding is completed. Further, federal law generally requires that a petitioner file a "properly filed application for State post-conviction or other collateral review" within a year after the underlying judgment became final. *See* 28 U.S.C. § 2244(d).

6. Therefore, petitioner seeks an order expressly providing that his Petition constitutes "a properly filed application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2) and expressly permitting him to amend and supplement his Petition within 120 days (or such later fixed date as the court may hereafter set), without fear that the court will dismiss or deny any or all parts of his Petition until after he has had an opportunity to amend his Petition within such 120-day (or later fixed) time period.

7. The Louisiana Supreme Court has consistently ruled in favor of death-sentenced inmates seeking meaningful post-conviction access to state courts. In a series of writ decisions, the Court has ordered district courts to provide funds for experts after counsel has made a showing of need.[1] Further, in many of those same cases (and in other post-conviction capital cases where funding was not the issue), the Court has also granted stays of execution in

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1. *See, e.g., State v. Copeland*, 614 So.2d 1245 (La. 1993); *State ex rel. Cage v. Whitley*, 593 So.2d 375 (La. 1992); *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992); *State v. Brown*, 566 So.2d 967 (La. 1990).

recognition that counsel and petitioner require *time* as well as money in order to develop and present claims for post-conviction relief.[2]

8. To the same end, just this last summer, the Legislature enacted similar provisions with the express

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2. The Louisiana Supreme Court has consistently recognized the need for time and expert assistance to develop claims before a trial court rules on a post-conviction petition. *See, e.g., State ex rel. Tart v. Cain*, 97-KP-2226 (La. 8/29/97) (stay granted and petitioner given "at least 90 days" in which to develop claims for post-conviction relief); *State ex rel. Martin v. Cain*, 96-60 (La. 1/12/96), 666 So.2d 312 (ordering that counsel be given sufficient time in which to research, investigate, and file petition for post-conviction relief); *State v. Wille*, 615 So.2d 328 (La. 1993) (granting four-months' time to prepare a post-conviction petition "to allow defense adequate time to prepare and file a petition"; as matters progressed in the preparation of the petition, minute entries show that the district court granted two additional extensions of time—the first for an additional five months and the second for two more months—to file the post-conviction petition, which was timely filed within the extended time period); *Cage*, 593 So.2d 375 (staying execution to allow counsel the opportunity to make a showing of the need for expert assistance prior to filing a petition for post-conviction relief); *Deboue*, 592 So.2d 1287 (ordering district court to provide funds for an expert to assist counsel in developing claims regarding mitigation of death-sentenced inmate, noting that petitioner "is entitled to an adequate opportunity to present his claim fairly"); *State ex rel. Lee v. Whitley*, 591 So.2d 703 (La. 1992) (staying execution (which was scheduled to occur within two weeks) and granting counsel six months to prepare and file an application for post-conviction relief); *State v. Brown*, 566 So.2d 967 (La. 1990) (ordering that funds for experts must be provided ***before*** the petition is filed, so that petitioner can avail himself of assistance in developing post-conviction claims)

statutory "purpose of providing legal services and related expenses for capital defendants who have been sentenced to death." La. Acts 1999, No. 1012, § 1.

9. It is common practice throughout Louisiana for the district court to stay an execution (or to withhold signing a warrant for execution) to allow death-sentenced inmates sufficient time to develop claims and file post-conviction claims with the supporting facts and reasons why an evidentiary hearing might be necessary. This has been accomplished by trial court orders for capital cases in at least East Baton Rouge Parish, Caddo Parish, Jefferson Parish, and Orleans Parish.

10. Petitioner's request for a date certain within which to amend and supplement simply insures that he and his counsel will have sufficient time to investigate the facts and develop the claims for relief, so as to present the court with a complete petition for post-conviction relief. This current motion simply allows counsel sufficient time to accomplish this goal, without fear that the filing of an incomplete petition will result in an automatic denial or dismissal of some or all of his Petition and thus operate to deprive petition of his statutory right to seek post-conviction relief.

APPENDIX J — EXCERPTS OF BRUMFIELD'S MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED MAY 9, 2001

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO. 1-93-865, SECTION II

DEATH CASE

STATE OF LOUISIANA,
ex rel. KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

BRUMFIELD'S MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF

Petitioner Kevan Brumfield ("Brumfield") moves this court for a continuance of the May 10, 2001 hearing on his Petition for Post-Conviction Relief. Brumfield is seeking a continuance for an additional ninety (90) days.

1. This is a capital case. The United States Supreme Court has admonished lower courts that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

2. Proceedings for post-conviction relief in Louisiana are authorized and governed by statutory and court rules. *See* La. C.Cr.P. arts. 924-930.8; La. Sup. Ct. Rule XXVII; *State ex rel. Tassin v. Whitley*, 602 So.2d 721 (La. 1992).

3. Petitioner wishes to avail himself of these remedies for post-conviction relief. Petitioner, who is indigent, requires the assistance of experts, funds with which to secure that assistance, and time for counsel to develop his claims for relief and the facts in support of those claims.

* * *

9. The Louisiana Supreme Court has consistently ruled in favor of death-sentenced inmates seeking meaningful post-conviction access to state courts. In a series of writ decisions, the Court has ordered district courts to provide funds for experts after counsel has made a showing of need.[1] Further, in many of those same cases (and in other post-conviction capital cases where funding was not the issue), the Court has also granted stays of execution in recognition that counsel and petitioner require ***time*** as well as money in order to develop and present claims for post-conviction relief.[2]

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1. *See, e.g., State v. Copeland*, 614 So.2d 1245 (La. 1993); *State ex rel. Cage v. Whitley*, 593 So.2d 375 (La. 1992); *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992); *State v. Brown*, 566 So. 2d 967 (La. 1990).

2. The Louisiana Supreme Court has consistently recognized the need for time and expert assistance to develop claims before

Appendix J

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a trial court rules on a post-conviction petition. *See, e.g., State ex rel. Tart v. Cain*, 97-KP-2226 (La. 8/29/97)(stay granted and petitioner given "at least 90 days" in which to develop claims for post-conviction relief); *State ex rel. Martin v. Cain*, 96-60 (La. 1/12/96), 666 So.2d 312 (ordering that counsel be given sufficient time in which to research, investigate, and file petition for post-conviction relief); *State v. Wilie*, 615 So. 2d 328 (La. 1993)(granting four-months' time to prepare a post-conviction petition "to allow defense adequate time to prepare and file a petition;" as matters progressed in the preparation of the petition, minute entries show that the district court granted two additional extensions of time--the first for an additional five months and the second for two more months--to file the post conviction petition, which was timely filed within the extended time period); *Cage*, 593 So.2d 375 (staying execution to allow counsel the opportunity to make a showing of the need for expert assistance prior to filing a petition for post-conviction relief); *Deboue*, 592 So.2d 1287 (ordering district court to provide funds for an expert to assist counsel in developing claims regarding mitigation of death-sentenced inmate, noting that petitioner "is entitled to an adequate opportunity to present his claim fairly"); *State ex rel. Lee v. Whitley*, 591 So.2d 703 (La. 1992)(staying execution (which was scheduled to occur within two weeks) and granting counsel six months to prepare and file an application for post-conviction relief); *State v. Brown*, 566 So.2d 967 (La. 1990)(ordering that funds for experts must be provided ***before*** the petition is filed, so that petitioner can avail himself of assistance in developing post-conviction claims).

APPENDIX K — EXCERPTS OF BRUMFIELD'S SECOND MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF AND FOR ADDITIONAL TIME TO AMEND THE PETITION, 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED SEPTEMBER 5, 2001

DOCKET NO. 1-93-865, SECTION II
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA, ex rel.
KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

DEATH CASE

BRUMFIELD'S SECOND MOTION TO CONTINUE THE HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF AND FOR ADDITIONAL TIME TO AMEND THE PETITION

Petitioner Kevan Brumfield ("Brumfield") moves this court for a continuance of the September 10, 2001 hearing on his Petition for Post-Conviction Relief and for additional time to amend his the Petition. Brumfield is seeking a continuance for an additional 120 days and an additional 90 days in which to amend his petition.

Appendix K

1. This is a capital case. The United States Supreme Court has admonished lower courts that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley,* 115 S. Ct. 1555 (1995).

2. Proceedings for post-conviction relief in Louisiana are authorized and governed by statutory and court rules. *See* La. C.Cr.P. arts. 924-930.8; La. Sup. Ct. Rule XXVII; *State ex rel. Tassin v. Whitley,* 602 So.2d 721 (La. 1992).

3. Petitioner wishes to avail himself of these remedies for post-conviction relief. Petitioner, who is indigent, requires the assistance of experts, funds with which to secure that assistance, and time for counsel to develop his claims for relief and the facts in support of those claims.

* * *

11. The Louisiana Supreme Court has consistently ruled in favor of death-sentenced inmates seeking meaningful post-conviction access to state courts. In a series of writ decisions, the Court has ordered district courts to provide funds for experts after counsel has made a showing of need.[1] Further, in many of those same cases (and in other post-conviction capital cases where funding was not the issue), the Court has also granted stays of execution in recognition that counsel and petitioner

1. *See, e.g., State v. Copeland,* 614 So.2d 1245 (La. 1993); *State ex rel. Cage v. Whitley,* 593 So.2d 375 (La. 1992); *State ex rel. Deboue v. Whitley,* 592 So.2d 1287 (La. 1992); *State v. Brown,* 566 So.2d 967 (La. 1990).

require ***time*** as well as money in order to develop and present claims for post-conviction relief.[2]

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2. The Louisiana Supreme Court has consistently recognized the need for time and expert assistance to develop claims before a trial court rules on a post-conviction petition. *See, e.g., State ex rel. Tart v. Cain,* 97-KP-2226 (La. 8/29/97) (stay granted and petitioner given "at least 90 days" in which to develop claims for post-conviction relief); *State ex rel. Martin v. Cain,* 96-60 (La. 1/12/96), 666 So.2d 312 (ordering that counsel be given sufficient time in which to research, investigate, and file petition for post-conviction relief); *State v. Wille,* 615 So.2d 328 (La. 1993) (granting four-months' time to prepare a post-conviction petition "to allow defense adequate time to prepare and file a petition"; as matters progressed in the preparation of thepetition, minute entries show that the district court granted two additional extensions of time—the first for an additional five months and the second for two more months—to file the post conviction petition, which was timely filed within the extended time period); *Cage,* 593 So.2d 375 (staying execution to allow counsel the opportunity to make a showing of the need for expert assistance prior to filing a petition for post-conviction relief); *Deboue,* 592 So.2d 1287 (ordering district court to provide funds for an expert to assist counsel in developing claims regarding mitigation of death-sentenced inmate, noting that petitioner "is entitled to an adequate opportunity to present his claim fairly"); *State ex rel. Lee v. Whitley,* 591 So.2d 703 (La. 1992) (staying execution (which was scheduled to occur within two weeks) and granting counsel six months to prepare and file an application for post-conviction relief); *State v. Brown,* 566 So.2d 967 (La. 1990) (ordering that funds for experts must be provided ***before*** the petition is filed, so that petitioner can avail himself of assistance in developing post-conviction claims).

APPENDIX L — EXCERPTS OF BRUMFIELD'S MOTION FOR ADDITIONAL THE TIME TO AMEND HIS PETITION FOR POST-CONVICTION AND TO CONTINUE THE HEARING, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED NOVEMBER 19, 2002

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO. 1-93-865, SECTION II

DEATH CASE

STATE OF LOUISIANA,
ex rel. KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

BRUMFIELD'S MOTION FOR ADDITIONAL THE TIME TO AMEND HIS PETITION FOR POST-CONVICTION AND TO CONTINUE THE HEARING

Petitioner Kevan Brumfield ("Brumfield") moves this court for additional time to amend his Petition for Post-Conviction Relief and a continuance of the hearing as currently set. Specifically, Brumfield is seeking an additional 180 days beyond the order granting additional time to amend his petition.

Appendix L

1. This is a capital case. The United States Supreme Court has admonished lower courts that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

2. Proceedings for post-conviction relief in Louisiana are authorized and governed by statutory and court rules. *See* La. C.Cr.P. arts. 924-930.8; La. Sup. Ct. Rule XXVII; *State ex rel. Tassin v. Whitley*, 602 So.2d 721 (La. 1992).

3. Petitioner wishes to avail himself of these remedies for post-conviction relief. Petitioner, who is indigent, requires the assistance of experts. funds with which to secure that assistance, and time for counsel to develop his claims for relief and the facts in support of those claims.

* * *

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1. *See, e.g., State v. Copeland*, 614 So.2d 1245 (La. 1993); *State ex rel. Cage v. Whitley*, 593 So.2d 375 (La. 1992); *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992); *State v. Brown*, 566 So.2d 967 (La. 1990).

well as money in order to develop and present claims for post-conviction relief.[2]

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2. The Louisiana Supreme Court has consistently recognized the need for time and expert assistance to develop claims before a trial court rules on a post-conviction petition. *See, e.g., State ex rel. Tart v. Cain*, 97-KP-2226 (La. 8/29/97) (stay granted and petitioner given "at least 90 days" in which to develop claims for post-conviction relief); *State ex rel. Martin v. Cain*, 96-60 (La. 1/12/96), 666 So.2d 312 (ordering that counsel be given sufficient time in which to research, investigate, and file petition for post-conviction relief); *State v. Wille*, 615 So.2d 328 (La. 1993) (granting four-months' time to prepare a post-conviction petition "to allow defense adequate time to prepare and file a petition"; as matters progressed in the preparation of the petition, minute entries show that the district court granted two additional extensions of time--the first for an additional five months and the second for two more months--to file the post-conviction petition, which was timely filed within the extended time period); *Cage*, 593 So.2d 375 (staying execution to allow counsel the opportunity to make a showing of the need for expet assistance prior to filing a petition for post-conviction relief); *Deboue*, 592 So.2d 1287 (ordering district court to provide funds for an expert to assist counsel in developing claims regarding mitigation of death-sentenced inmate, noting that petitioner "is entitled to an adequate opportunity to present his claim fairly"); *State ex rel. Lee v. Whitley*, 591 So.2d 703 (La. 1992) (staying execution (which was scheduled to occur within two weeks) and granting counsel six months to prepare and file an application for post-conviction relief); *State v. Brown*, 566 So.2d 967 (La. 1990) (ordering that funds for experts must be provided ***before*** the petition is filed, so that petitioner can avail himself of assistance in developing post-conviction claims).

APPENDIX M — EXCERPTS OF FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED JUNE 16, 2003

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO. 1-93-865, SECTION II

DEATH CASE

STATE OF LOUISIANA, ex rel.
KEVAN BRUMFIELD,

Petitioner,

versus

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF

COMES NOW, petitioner, Kevan Brumfield ("Brumfield"), and applies to this Court pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 3, and Articles 1, §§ 2, 3, 5, 13, 14, 16, 17 & 20 of the Louisiana Constitution, as well as other law set forth below, for an order granting post-conviction relief in his case. The grounds for his petition are as follows:

Appendix M

REQUIRED INFORMATION

1. Brumfield's Uniform Application for Post-Conviction Relief includes the required information and was filed on March 16, 2000 (annexed as Exhibit 1) along with his Petition for Post-Conviction Relief, which is amended through the submission of this First Amended Petition for Post-Conviction Relief. The Brumfield's March 16, 2000 filing is incorporated by reference as though set forth fully herein.

2. Petitioner, Brumfield, DOC No. 316981, is currently in the custody of the State of Louisiana Department of Corrections and his place of custody is the Louisiana State Penitentiary at Angola, Louisiana.

3. Brumfield's custodian is respondent Burl Cain, who is sued in his official capacity as the warden of the Louisiana State Penitentiary at Angola, Louisiana.

4. Following his arrest and subsequent indictment on a charge of first degree murder, petitioner was tried by a jury sitting in the 19th Judicial District Court for the Parish of East Baton Rouge, Baton Rouge, Louisiana with the Honorable Ralph Tyson, District Judge, presiding. At trial, Brumfield was represented by Edward R. Greenlee (Bar No. 6340) and Tyrone Brown, The Office of Public Defender, 333 St. Louis Street, Baton Rouge, Louisiana, 70802, who were appointed by the court due to Brumfield's indigent status. Brumfield did not testify during the guilty phase of the trial.

5. On July 2, 1995, following a trial by jury in the case entitled *State v. Kevan* Brumfield, Docket No. 1-93-865, (19th JDC), Brumfield was convicted by the jury of first degree murder.

6. Brumfield was represented again by Mr. Greenlee and Mr. Brown, his court appointed counsel, during the penalty phase and sentencing in this case. Again, as in the guilty phase of the trial, Brumfield did not testify during the penalty phase of the trial. Following the penalty phase, the same jury returned a sentence of death by lethal injection. The record does not contain a document formally labeled as a judgment of conviction or sentence; however, annexed as Exhibit 2 to this petition is a copy of the jury's verdict of guilty rendered on July 2, 1995 [Record II:302], annexed as Exhibit 3 to this petition is a copy of the jury's recommendation of death rendered on July 3, 1995 [Record II:309], and annexed as Exhibit 4 to this petition a copy of the criminal commitment dated September 18, 1995 [Record II:316].

7. Brumfield appealed from the judgment of conviction and sentence and was represented by court appoint counsel on appeal. Brumfield's appellate counsel was G. Paul Marx, 2014 W. Pinhook, Suite 404, P.O. Box 82389, Lafayette, LA 70598-2389.

8. On October 20, 1998, the Louisiana Supreme Court on direct appeal affirmed his conviction and death sentence. *See State of Louisiana v. Kevan Brumfield*, Docket No. 96-KA-2667 (La. 10/20/98), 737 So.2d 660. No petition for rehearing was filed with the Louisiana Supreme Court.

Appendix M

9. On March 22, 1999, the United States Supreme Court denied Brumfield's timely petition for a writ of certiorari to review the Louisiana Supreme Court's ruling. *See Brumfield v. Louisiana*, 119 S. Ct. 1267 (1999)(Docket No. 98-7702).

10. Brumfield did not file for rehearing of the United States Supreme Court's denial of his petition within the 25-day period under Rule 44.1 of that court. Thus, under Rule 45.2 of that court, that court's mandate issued on, and Brumfield's conviction and sentence became final, on April 16, 1999.

11. Because Brumfield's conviction and sentence are now final and not subject to further appeal, this petition is ripe. *See* La. C.Cr.P. art. 924.1. Because Brumfield was sentenced to death, he has no time limit to file this petition. *See* La. C.Cr.P. art. 930.8(A)(4).

12. Because Brumfield was convicted in this parish, venue for this petition and application is proper in this parish. *See* La. C.Cr.P. art. 925.

13. Brumfield has not filed any prior petitions or applications for writs of habeas corpus or for post-conviction relief.

14. The entire record for the earlier criminal action (including without limit the district court record in its Docket No. 1-93-865, all pre-trial writ proceedings, the Louisiana Supreme Court record in its Docket No. 96-KA-2667, and the United States Supreme Court record

in its Docket No. 98-7702) is incorporated by reference as if fully annexed to this petition.

15. As further explained below, Brumfield is entitled to have his conviction and sentence set aside because they were obtained in violation of both the United States Constitution and the Louisiana Constitution. *See* La. C.Cr.P. art. 930.3(1).

THE ISSUES PRESENTED

16. Petitioner raises the following issues, predicating each one on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, on the Constitution of the State of Louisiana, and on such other law as may be set forth below and in any memoranda in support of his Petition for Post-Conviction Relief:

THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS THE EXECUTION OF PERSONS SUFFERING FROM MENTAL RETARDATION

17. The United States Supreme Court recently held in *Atkins v. Virginia*, __ U.S. __, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) that the execution of individuals with mental retardation violates the Eighth Amendment of the federal constitution because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 122 S.Ct. at 2251. According to the *Atkins* Court, defendants with mental retardation are not as culpable as fully functioning adult persons because they

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability.

Id. at 2250-51.

18. Thus, in *Atkins*, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court concluded that the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S.Ct. at 2252.[1]

19. In *Atkins*, the Court began by establishing that a fundamental "precept of justice" is that "punishment for crime should be graduated and proportioned to the offense." 122 S. Ct. at 2246 (internal citations omitted). The

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1. Quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

Court made clear that determining whether a punishment is constitutionally excessive or cruel and unusual[2] is judged by current norms, not by those which existed at the time the Eighth Amendment was ratified. *Id.* at 2247. The core Eighth Amendment concept is the "dignity of man" and thus its constitutional content must be informed by "the evolving standards of decency that mark the progress of a maturing society." 122 S.Ct. at 2247 (*quoting Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The evolving standard, the Court declared should be informed by "objective factors" to the maximum extent possible, the most reliable evidence of which is found in state legislative enactments and jury verdicts. *Id.* However, the Court adhered to the constitutional principle that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* (*quoting Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

20. With these principles established, the Court first reviewed the legislative record. The Court was impressed with the fact that at the time of *Penry*, only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders. 122 S. Ct. at 2248. However, since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. The Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 2249. These enactments, "[g]iven the well-known popularity of

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2. The Court left no doubt that the Eighth Amendment prohibits "all excessive punishments as well as cruel and unusual punishments which may or may not be excessive." *Id.*

anticrime legislation," provided the Court with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* The Court relied also upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* In its search for a national consensus, the Court also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, *id.* at 2249, n. 21, the opposition to the practice by "widely diverse religious organizations,"[3] international practice,[4] and polling data.[5] While "not dispositive," these factors bolstered the Court's opinion that there was a consensus opposing the practice "among those that have addressed the issue." *Id.* Finally, the Court also noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*. *Id.* Since the practice had become "truly unusual," it was "fair to say that a national consensus has developed against it." *Id.*

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3. The Court noted that representatives of Christian, Jewish, Muslim and Buddhist organizations believed that the execution of persons with mental retardation could not be justified. *Id.*

4. [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.*

5. [P]olling data shows a widespread consensus among Americans, even those that support the death penalty, that executing the mentally retarded is wrong." *Id.*

21. The consensus reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." 122 S. Ct. at 2250. The Court noted that, due to their impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id.*

22. These impairments and handicaps, while not justifying an exemption from criminal liability, do diminish a mentally retarded person's personal culpability to the extend that neither of the justifications advanced by states in support of the death penalty - retribution and deterrence - would be served by permitting a retarded person's execution. *Id.* Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." 122 S. Ct. at 2252. Since "just desserts" necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* And, because capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will "inhibit criminal actors from carrying out murderous conduct," no deterrence interests are served by imposing the death penalty on the mentally retarded. *Id.* This type of calculus, the Court noted, is at the "opposite end of the spectrum" from behavior of the

mentally retarded due to their cognitive and behavioral impairments. *Id.*[6]

23. In addition to concluding that retention of the death penalty for mentally retarded defendants would not further any legitimate interest in retribution or deterrence, the Court also opined that the reduced capacity of mentally retarded offenders provided a "second justification for a categorical rule making such offenders ineligible for the death penalty." *Id.* at 2251. Due to their impairments, there were a host of factors - the increased risk of false confessions, difficulties in communicating with counsel, especially with regards to issues involving mitigation, lesser ability to effectively testify on their own behalf or express remorse due to limited communication skill - that, "in the aggregate," carried an unacceptable "risk of wrongful executions" for mentally retarded defendants.[7]

24. Thus, the Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislature that have . . . concluded

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6. The Court also concluded that exempting the mentally retarded from capital punishment would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are "not protected by exemption." *Id.*

7. The Court also noted the danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes" which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. *Id.*

that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id.* (quoting *Ford v. Wainright*, 477 U.S. 399, 405 (1986)).

Definition of Mental Retardation

25. The U.S. Supreme Court in Atkins recognized that standardized clinical definitions of mental retardation exist. Atkins specifically referred to the definition published by the American Association of Mental Retardation (hereinafter AAMR), the nation's oldest and largest professional organization in the field of mental retardation, and the adoption of that same definition by the American Psychiatric Association (hereinafter APA). Id. at 2245 n. 3.

The 2002 AAMR definition of mental retardation provides:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002). This definition consists of three primary diagnostic criteria: limitations in intellectual functioning, limitations in adaptive behavior, and onset preceding age eighteen. This basic tripartite definition has been adopted by the AAMR, the APA,

and the American Psychological Association, and is widely used and accepted amongst individual practicing professionals.

26. Mental retardation is assessed using well-established, valid and reliable tests and procedures. There are specific instruments that test for each of the three. Valid and reliable I.Q. tests normalized on the general population have been around for some time. The standard instrument for this determination is the Wechsler Adult Intelligence Scales-III (WAIS-III). *Atkins*, 122 S.Ct. at 2245 n.5.

27. The ninth edition of the AAMR definition, cited by the Supreme Court in *Atkins*, also recognized the uncertainty in I.Q. measurement, defining "significantly subaverage intelligence" as an I.Q. of "approximately 70 to 75," taking into account measurement error. *Atkins*, 122 S.Ct. at 2245 n.3. The DSM-IV-TR requires an I.Q. score of "about 70 or below," and adds a statement concerning measurement error, and an example of a Weschsler IQ of 70 as representing in actuality a range of 65 to 75. DSM-IV-TR, *supra*, at 41. The DSM-IV also notes that measurement error may vary from instrument to instrument. *See id.*

28. The second criterion for a diagnosis of mental retardation refers to limitations in conceptual, social and practical skills. These are skills that people have learned so that they can function in their everyday lives. Limitations in adaptive behaviors impact a person's daily life and affect the ability to respond to a particular

situation or to the environment. Examples of adaptive skills include: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Atkins*, 122 S.Ct. at 2245 n. 3. Currently, in the tenth edition of the AAMR, the adaptive behavior skills have been refined as follows:

Conceptual Skills-
- Receptive and expressive language
- Reading and writing
- Money concepts
- Self-directions

Social Skills-
- Interpersonal
- Responsibility
- Self-esteem
- Gullibility (likelihood of being tricked or manipulated)
- Naiveté
- Follows Rules
- Obeys laws
- Avoids victimizations

Practical Skills-
- Personal activities of daily living such as eating, dressing, mobility and toileting.
- Instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation and doing housekeeping

activities.
Occupational skills
Maintaining a safe environment

Ex. 1.

Under the Standard and Accepted Scientific and Diagnostic Criteria, and the Applicable Jurisprudence this Court is Required to Hold an Evidentiary Hearing and, Following that Hearing, to Find that Kevan Brumfield is Mentally Retarded.

29. The *Atkins* decision has been applied to Louisiana Cases in several recent decisions of the Louisiana Supreme Court. The most detailed review of the state of the law post-*Atkins* is found in the Louisiana Supreme Court's opinion in *State v. Williams*, 01-1650 (La. 2002) __ So. 2d __.

30. White noting that "not everyone faced with a death penalty sentence will automatically be entitled to a post-*Atkins* hearing," the *Williams* Court held that "[i]t will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. A defendant's entitlement to a post-Atkins hearing will be made on a case-by-case basis." *Id.* at 16.

31. In *Williams* the Court focused on various factors in determining that the record supported a post-*Atkins* hearing including that:

> defendant is an individual who: 1) was 16 years of age at the time of the murder, still within the "developmental stage" by any definition of that term; 2) will not be 22 years of age until 2003, still within the development stage by Louisiana's statutory definition; 3) has an IQ within the range used in the diagnosis of mental retardation; 4) suffered from lead poisoning as an infant and had numerous mental health commitments prior to the age of 15; 5) was enrolled in "special ed" classes; and 6) has not had the issue of mental retardation put before the fact finder in light of the *Atkins* restriction on the death penalty. Thus, this court concludes the defendant is entitled to an evidentiary hearing which will give him an opportunity to prove he is mentally retarded pursuant to the definitions of LSA-R.S. 28:381, and, under Atkins, not subject to the death penalty. Defendant's case will be remanded to the trial court for an evidentiary hearing on the issue of mental retardation only.

Williams, at 16.

32. Like Williams, petitioner's case is accompanied by a host of objective facts which raise the issue of mental retardation. Kevan Brumfield was 20 years of age at the time of the murder and still within the developmental stage set by the Louisiana statutes. His IQ score as determined shortly before the trial was 75, on the low end of the intelligence scale and he was reading at approximately a Fourth Grade level. (R. Vol. XVI, pp. 3904 & 3907-08).

33. He was born on January 7, 1973. He arrived prematurely and his birth weight was 3.5 pounds or less. (R. Vol. XVI, pp. 3821 & 3872).[8] Medical records which were recovered for this period indicate "that he was born with slower responses than normal babies." (R. Vol. XVI, p. 3873). He remained hospitalized for two to three months after he was born. (R. Vol. XVI, pp. 3821 & 3873-74).

34. From childhood, Brumfield suffered severe, uncontrolled seizures. (R. Vol. XVI, pp. 3832 & 3854). As a child, he was prescribed numerous medications including: Thorazine, Mellaril, Ritalin, Artane, and Vistaril. (R. Vol. XVI, pp. 3826, 3829, 3881-82, 3884 & 3906). He was also treated, as a child and an adolescent, at two psychiatric hospitals. (R. Vol. XVI, pp. 3825, 3829, 3881 & 3884).

35. As early as third grade issues regarding Brumfield's learning and behavioral disabilities were noticed by his teachers. Once diagnosed, Brumfield spent a significant amount of his schooling in special education classes. (R. Vol. XVI, pp. 3846-49). Eventually, at approximately 10 years of age, Brumfield was identified as having some form of learning disability. (R. Vol. XVI, pp. 3881-82).

36. Brumfield suffers from mental retardation. He has an IQ score of approximately 75, he has deficits in adaptive behaviors, and his condition existed before the

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8. The record volume numbers correspond to the volume numbers in the Louisiana Supreme Court's copy of the district court record.

age of eighteen. By definition, his personal culpability in the murder is diminished and his execution will not serve the two penological goals of the death penalty, and therefore, he cannot be executed.

37. Moreover, under the applicable standards set forth in *Williams*, Brumfield is entitled to a evidentiary hearing on his mental retardation claim.

CUMULATIVE ERROR

THE CUMULATION OF ERROR IN THIS CASE RENDERS THE CONVICTION UNCONSTITUTIONALLY UNRELIABLE

38. The issues discussed below cannot be viewed in isolation. Petitioner incorporates all of the issues below and asserts his right to a fair trial, free from the cumulative taint of each of the errors combined. For example, the Florida Supreme Court has applied this analysis in a capital case:

> Gunsby is entitled to a new conviction-phase proceeding. *We reach this conclusion based on the combined effect of the errors in this case,* which include the State's erroneous withholding of evidence, the ineffective assistance of counsel in failing to discover evidence, and newly discovered evidence reflecting that this was a drug-related murder rather than a racially motivated crime.

State v. Gunsby, 670 So. 2d 920, 921 (Fla. 1996) (emphasis supplied).

39. Similarly, the Supreme Court has increasingly adopted an approach in habeas corpus cases that has focused on the totality of the circumstances of a trial under review. *See, e.g., Darden v. Wainright*, 477 U.S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144 (1986) (prosecutor's allegedly erroneous statements assessed in terms of "their effect on the trial as a whole"); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (when reviewing counsel's effectiveness, court must look to "all the circumstances" of the trial); *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (waiver of constitutional rights assessed in light of the "totality of the circumstances"); *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (custodial status of suspect evaluated in light of the "totality of the circumstances").

* * *

99. The trial court's jury charge as to "reasonable doubt" was constitutionally inadequate under *Cage, Sullivan, Humphrey*, and similar cases.

* * *

102. As long as he is incompetent, Brumfield cannot be executed.

103. From the time of his arrest to the present date, Brumfield has been indigent.

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104. Under La. R.S. 15:149.1 and otherwise, Brumfield is entitled to funds for his counsel to investigate his claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts (including without limit for a magnetic resonance imaging (MRI) of Brumfield's brain, for neurologists, psychiatrists, and other medical doctors to review Brumfield's medical records and to examine his person, an expert on the use of hypnosis-induced testimony, and a criminologist). However, the Legislature has not yet allocated any amounts to fund this statutory mandate. Thus, until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.

105. Because undersigned counsel have not been provided funds for their representation, for retaining any experts, or otherwise and have not had adequate resources to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside, petitioner will separately seek funding from the this Court and request additional time to amend this petition once funding issues have been resolved.

CONCLUSION

WHEREFORE, for these reasons and others that may appear at a hearing on this matter, Kevan Brumfield seeks an order as follows:

1. Granting him all the resources necessary to the proper presentation of his case;

2. Granting him liberal discovery in order to prove these and other violations of his rights;

3. Granting him leave to amend his petition as other facts may become known;

4. Granting him an evidentiary hearing on the issues set forth above;

5. Granting him relief from his conviction in this case;

6. Granting him relief from his sentence in this case; and

7. Granting him such other relief as equity and justice may require.

* * * *

APPENDIX N — EXCERPTS FROM STATE'S ANSWER TO FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DATED AUGUST 21, 2003

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

DOCKET NO. 1-93-865 SEC. II

KEVAN BRUMFIELD

VERSUS

BURL CAIN, WARDEN

STATE'S ANSWER TO FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF

On or about June 16, 2003, petitioner filed a First Amended Petition for Post-conviction Relief. In it, he has presented the following issues for review: (1) the Eighth Amendment prohibits execution of the mentally retarded as set forth in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), an evidentiary hearing should be held regarding this issue, and petitioner should be declared mentally retarded; (2) cumulative error renders conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for various enumerated reasons; (3) petitioner's conviction and sentence should be overturned due to juror misconduct;

(4) jury misconduct and lack of impartiality requires that the conviction and sentence should be overturned; and (5) other listed claims constituted error. The state submits that petitioner's conviction and sentence should be upheld on post-conviction review.

ARGUMENT

CLAIM NUMBER ONE: Defendant has not met his burden under *Atkins v. Virginia*,[1] *State v. Williams*[2] and *State v. Dunn*[3] to come forward and present to this court objective evidence that puts his mental condition at issue.

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335(2002), a case decided after petitioner's conviction and sentence, held that executing mentally retarded offenders is excessive under the Eight Amendment to the United States Constitution. The Louisiana Supreme Court subsequently acknowledged in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So.2d 835, that it is bound by *Atkins*' holding. *Atkins* left the task of developing appropriate ways to enforce the constitutional restriction against the execution of mentally retarded to the states. *State v. Williams*, 831 So. 2d at 852. As a result, the court in *Williams* held that until there is legislative action on the

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1. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335(2002).

2. *State v. Williams*, 01-1650 (La. 11/01/02), 831 So.2d 835.

3. *State v. Dunn*, 01-1635 (La. 11/1/01), 831 So.2d 862.

subject, the proper procedure to be used to follow *Atkins* is for the trial courts to treat the issue procedurally as they would pretrial competency hearings, for which statutory criteria already exists in Louisiana. *State v. Williams*, 831 So.2d at 858.

The court specifically stated in *Williams* that ". . . not everyone faced with the death penalty sentence will automatically be entitled to a post-*Atkins* hearing. It will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. . . . A defendant's entitlement to a post *Atkins* hearing will be made on a case-bycase basis." *State v. Williams*, 831 So.2d 857.

In *Williams*, the court found universal agreement that a diagnosis of mental retardation has three distinct components: 1) sub-average intelligence, as measured by objective standardized I.Q. tests; 2) significant impairment in several areas of adaptive skills; and 3) manifestations of this neuropsychological disorder in the developmental stage. *State v. Williams*, 881 So.2d at 854. Sub-average intelligence has been determined to be an I.Q. of seventy or below on the Wechsler scale. *State v. Dunn*, 2001-1635 (La. 11/1/02) 831 So.2d 862, 887, n. 9. Significant impairment in several areas of adaptive skills include the areas of (1) self care, (2) understanding and use of language, (3) learning, and (4) mobility. *State v. Williams*, 831 So.2d at 854. The developmental stage is terminated at age twenty-two, and thus, the manifestations of the neuropsychological disorder must present itself prior to that date. *State v. Williams*, 831 So.2d at 854, n. 27.

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In *Williams*, the court upheld the conviction and pretermitted review of the penalty phase and remanded the matter to the trial court for an evidentiary hearing to determine if that defendant was mentally retarded. The court based its decision on the fact that the appellate record was not complete and explained that there were missing reports that prevented the court from making a determination that Williams was mentally retarded based on the record. *State v. Williams*, 831 So.2d at 856. However, the court determined that since the defendant had at least four psychiatric hospitalizations, was still under the age of twenty-two at the time the appeal was argued, had an I.Q. of sixty-eight, and since there were medical records that were not in the record which indicated that the Department of Corrections determined a year prior to the crime that the defendant was mentally retarded, the defendant met his burden of showing objective factors that put the issue of mental retardation in question. *State v. Williams*, 831 So.2d at 854.

Similarly, in *State v. Dunn*, supra, the court determined that the defendant met his burden of showing objective factors that put the issue of mental retardation in question and then stated that ". . . given the sparse record on this issue, this Court cannot decide whether Dunn is mentally retarded." *State v. Dunn*, 831 So.2d at 886. The court further stated that ". . . the defendant must be afforded the opportunity to meet that burden in a case such as this in which an expert testified without contradiction Dunn is mentally retarded and his I.Q. is very close to that which would indicate mental retardation." *State v. Dunn*, 831 So.2d at 886. In *Dunn*, the objective factors that placed the

issue of mental retardation in question was the testimony of Dr. Zimmerman, the defense expert, who testified that the defendant "was mildly mentally retarded," as well as the testimony of Dr. Sara DeLand, a defense expert in the area of forensic psychiatry, who testified that the defendant was "significantly intellectually limited—on the high end of mild mental retardation." *State v. Dunn*, 831 So.2d at 884-885. As a result, the court again affirmed the conviction, pretermitted review of the penalty phase of the trial, and remanded the matter for a post-*Atkins* hearing.

In *State v. Tate*, 01-1658 (La. 5/20/03), the Louisiana Supreme Court denied that defendant on direct appeal a post-*Atkins* hearing due to the facts in that case. The defendant in *Tate*, just as in the present case, scored seventy-five on the Wechsler 1.Q. test. The clinical psychologist in the *Tate* case testified that the defendant was not mentally retarded. The court quoted the expert: "'By definition, mentally retarded, in this state requires an intellectual functioning at this level, but also requires that you are unable to perform your daily tasks of living. So by definition in this state, he doesn't fit that picture.' Dr. Merrill, the expert, also testified that, although the defendant did not do well in school, he functioned on a seventh or eighth grade achievement level." *Tate*, 01-1658 at p. 28.

In the present case, petitioner cannot meet the burden of providing objective factors that put at issue the fact of mental retardation. Dr. John Bolter, an expert clinical neuropsychologist, testified on behalf of petitioner at the penalty phase of trial. Dr. Bolter testified he gave

petitioner "a comprehensive battery of tests that are sensitive to brain functions and my primary purpose in doing the evaluation was to determine to what extent . . . he may be manifesting any kind of neurological deficits in cognitive functions . . . . " (Vol. XVI tr. p. 146; R. p. 3904.) He concluded petitioner had educational problems probably associated with some type of attention deficit disorder and that he had an antisocial personality, which meant petitioner was sociopathic. (Vol. XVI tr. p. 146; R. p. 3904.) Dr. Bolter stated he gave petitioner the Wechsler Adult Intelligence Test and that petitioner scored seventy-five. (Vol. XVI tr. p. 149; R. p. 3907.) Dr. Bolter testified that he was aware that Dr. Bryan[4] Jordan had tested petitioner and rated petitioner's intelligence even "a little higher" than Bolter had. (Vol. XVI tr. p. 149; R. p. 3907.) Dr. Bolter explained the characteristics of a person having antisocial personality disorder, such as petitioner, as follows: "Well, on a basic level it's an absence of a conscience. It's the ability to disregard the rights and feelings of others in favor of what you want, in particular, at any given time and you have the capacity to manipulate people so that you can seek out what you want. And there is no sense of compunction or remorse." (Vol. XVI tr. p. 151; R. p. 3909.) Dr. Bolter also acknowledged that the intelligence tests that he administered to petitioner did not factor in the ability to function in the real world. (Vol. XVI tr. p. 151; R. p. 3909.)

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4. The trial transcript refers to Dr. "Bryan" Jordan; however, Dr. Jordan's letterhead used for petitioner's psychological evaluation reveals that his given name is spelled "Brian."

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Dr. Cecile Guin also testified on behalf of the defense at trial. Petitioner contends he was born "prematurely and his birth weight was 3.5 pounds or less." (Petitioner's supplemental brief p. 9.) Dr. Guin's trial testimony conflicts with this statement. Dr. Guin testified:

> Kevan was born in 1973 and he was born—I know his mom reported two point five pounds, but I've gone and got the official records. So I think they have memory—they're counting on their memory and I get the official records, so you'll find some discrepancies. But he actually weighed three point five pounds and he was not born premature. He was born almost at thiry [sic]-thirty-six to thirty-eight weeks gestation, which I understand is just about full term. So he was born at three point five pounds at full term.

(Vol. XVI tr. p. 114; R. p. 3872.) Dr. Guin on cross-examination testified as to petitioner's work and social history as follows:

> Q. [by the prosecutor]. Dr. Guin, during your history of Mr. Brumfield did he advise you of the extent of his work history during his twenty some odd years?
>
> A. [by Dr. Guin]. He informed me and others informed me that he attended Camelot Cooking School and finished there and that he cooked at two restaurants.

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Q. Okay. Was the maximum period of his work history approximately three months at Ralph and Kacoo's during his entire adult life?

A. Somewhere in that neighborhood.

Q. And did he indicate to you what his preference was for earning a living?

A. Yes. He said that he—it was—that drug dealing was more effective.

Q. And is that the reason he quit his job at Ralph and Kacoo's, was that selling drugs and guns was more profitable to him?

A. He suggested that he had a number of children and could not survive on his income at Ralph and Kacoo's.

Q. Are you aware of the fact that in Dr. Jordan's report at page 2 discusses Mr. Brumfield's lifestyle and states that he's been quite active socially? Direct you to—that would be the fourth full paragraph on page 2 of Dr. Jordan's report.

A. Okay.

Q. He states that he's been quite active socially. He reports having five illegitimate children who he does not support by three different females

> and he enjoys an active lifestyle with socializing, drug deals, and related aspects of night life. Did he discussed [sic] this with you?
>
> A. Well, I discussed that with the mother of his first two children and that's not what she told me. As a matter of fact, she told me that he supported her first child.

(Vol. XVI tr. p. 138; R. pp. 3896-97.) In connection with Dr. Guin's testimony, the petitioner's psychological evaluation by Dr. Jordan was introduced into evidence as State 6A. (Vol. XVI tr. pp. 138, 141; R. pp. 3896, 3899.) Dr. Jordan's report states that petitioner's intellectual functioning "is slightly limited but generally close to the Average Range." (Dr. Jordan's report, p. 3.) The trial court's order for the defense at trial to produce Dr. Jordan's report to the state as a matter of discovery was upheld on direct appeal to the Louisiana Supreme Court due to the fact that Dr. Guin testified that she had relied in part on Dr. Jordan's report to form her conclusions. *State v. Brumfield,* 96-2667, p. 10-11 (La. 10/20/98), 737 So.2d 660, 666-67.

Petitioner's family members and Dr. Guin testified as to petitioner's abused and neglected childhood. Ms. Leblanc, the attorney representing the Louisiana Office of Human Services, indicated to the trial court during the penalty phase, however, that that office had no records on petitioner concerning child neglect or abuse. (Vol. XVI tr. p. 79; R. p. 3837.)

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The Louisiana Supreme Court set forth the following factors to determine mental retardation: (1) sub-average intelligence, as measured by objective standardized I.Q. tests, which the court stated is an I.Q. of seventy on the Wechsler scale; (2) significant impairment in several areas of adaptive skills including self care, understanding and use of language, learning, and mobility; and (3) manifestations of this neuropsychological disorder in the developmental stage, which is before age twenty-two. *State v. Williams*, 881 So.2d at 854; *State v. Dunn*, 831 So.2d at 887. The record in this case reflects that petitioner's I.Q. on the Wechsler scale is a seventy-five, five points higher than the upper level of mental retardation based on the Wechsler scale. The record reflects that petitioner was able to live on his own and function in society. Petitioner's problem, as was admitted by Dr. Guin, was petitioner's voluntary choice to live outside the bounds of the law, rather that to work at a trade in the restaurant industry as he was capable of doing. The present case can be distinguished from *Williams* and *Dunn*. In each of those cases, there was specific testimony and evidence that gave an opinion that the defendants in those cases were mentally handicapped. In *Williams* and *Dunn*, the defendants met the burden to place mental retardation at issue and the court determined that the record was inadequate to make a determination. In the present case, petitioner has not met this burden.

The objective facts surrounding the murder of Corporal Smothers and the simultaneous shooting of passenger Kimen Lee cannot be ignored in light of a potential claim of mental retardation. Petitioner was

the ringleader of the group comprising himself, Henri Broadway, and West Paul. He provided both weapons as well as the getaway vehicle. The premeditated nature of the crime included Broadway and two unidentified black males visiting the Piggly Wiggly store some ten days before the murder as well as a final visit to the store where the victims were working by petitioner and Broadway some seventy-five to ninety minutes before the attack. The three men lay in wait at the bank's night depository awaiting the victims' arrival. The two shooters then simultaneously shot at each side of the police unit, striking each of the two women according to a pre-ordained plan. This was not the first such assault planned and led by Brumfield as is well illustrated by the crimes introduced at the penalty phase of trial.

In each of the post-*Atkins* decisions, the court specifically stated that not everyone faced with the death penalty sentence will automatically be entitled to a *post-Atkins* hearing and that the decision will be made on a case-by-case basis. This petitioner cannot meet his burden of showing objective factors that put the issue of mental retardation in question and is thus not entitled to a post-*Atkins* hearing. Petitioner's score of seventy-five on the Wechsler I.Q. test puts him above the level of mental retardation as scored by that test. Furthermore, petitioner has demonstrated no impairment of adaptive skills, which would place the claim of mental retardation at issue.

Since petitioner cannot meet the burden of showing objective factors that put the issue of mental retardation

in question, he is not entitled to a post-*Atkins* hearing. Petitioner's request for relief should be denied.

CLAIM NUMBER TWO: Petitioner's cumulation of error theory does not provide grounds for reversal of petitioner's conviction and sentence.

In this claim, petitioner seems to urge this court to independently review the entirety of the record, regardless of contemporaneous objection, to determine whether or not the aggregate effect of unspecified errors, not sufficient to mandate reversal alone, warrants reversal of the conviction and sentence. This claim is meritless.

The Louisiana Supreme Court in *State v. Robertson*, 97-0177, p. 54 (La. 3/4/98); 712 So.2d 8, 46, *cert. denied* 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998), considered a similar claim and noted:

> Here, defendant argues the cumulative effect of the errors urged, as well as those not urged but which are revealed by a review of the record, requires reversal of defendant's conviction and sentence. This court has not uncovered any reversible error, urged or unurged, in the record. Furthermore, the combined effect of the incidences defendant has complained of, none of which amounts to reversible error, did not deprive this defendant of his right to a fair trial.

See also State v. Copeland, 530 So.2d 526, 544 (La. 1988), *cert. denied* 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989), and *State v. Frost*, 97-1771 (La. 1/29/99), *concurring opinion in denial of rehearing.* The Louisiana Supreme Court in *State v. Wessinger*, 98-1234, p. 44 (La. 5/28/99), *citing State v. Strickland*, 94-0025 (La. 11/1/96); 683 So.2d 218, stated: "We simply do not believe that 'the cumulative effect of assignments of error lacking in merit warrants reversal of a conviction or sentence.'"

In federal habeas cases, courts have likewise often rejected cumulation of error claims. *See Spence v. Johnson*, 80 F.3d 989 (5th 1996), *cert. denied* 519 U.S. 1012, 117 S.Ct. 519, 136 L.Ed.2d 407 (1996), and *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992), *cert. denied* 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993). In *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987), a federal court on habeas corpus review of a state conviction rejected a petitioner's contention that an aggregation of his meritless claims justified reversal of the conviction by concluding that "[t]wenty times zero equals zero."

In the present case, petitioner has failed to show how error, if any existed, deprived him of fundamental fairness or prejudiced him to the extent that he was not afforded a fair trial. This contention lacks merit.

CLAIM NUMBER THREE: Petitioner received ineffective assistance of counsel.

Petitioner asserts in this supplemental petition for post-conviction relief that he received ineffective

assistance of counsel in violation of the Sixth Amendment of the United States Constitution for the following enumerated reasons: (a) penalty phase counsel was not properly qualified for the trial; (b) defense trial counsel failed to investigate and prepare mitigation evidence; (c) defense trial counsel failed to present mitigation evidence at trial; (d) defense trial counsel presented an unacceptable, irrelevant argument in the penalty phase; (e) defense trial counsel failed to rehabilitate defense witness Dr. Cecile Guin concerning her views on the death penalty; (f) defense trial counsel failed to preserve the penalty phase record by allowing arguments to be heard and rulings to be made off the record; (g) defense trial counsel failed to object during the penalty phase to the state's arguments concerning petitioner's uncharged misconduct and petitioner's prior allegations of police misconduct; (h) defense trial counsel failed to raise as an issue petitioner's mental capacity to proceed since one expert recommended stimulant medication to enhance petitioner's ability to assist counsel; and (i) defense trial counsel failed to question prospective jurors in a manner to allow for the intelligent use of peremptory challenges. All of these ineffective assistance of counsel claims were presented to the Louisiana Supreme Court on direct appeal, and the court ruled that the issues were more properly to be considered on post-conviction relief. *Brumfield*, 96-2667 at pp. 13-14 (La. 10/20/98), 737 So.2d at 668-69.

The appropriate standard for considering ineffective assistance of counsel claims was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984), and its progeny. The state has outlined the standard of review in the State's Response to Application for Post-conviction Relief filed on or about November 3, 2000. (State's original answer pp. 8-10.) The state maintains that none of the issues petitioner has presented meets the two-pronged test required by *Strickland* in order to prove a constitutional deficiency in counsel's performance.

A. Petitioner's trial attorneys were experienced litigators who provided defendant with effective assistance of counsel.

Petitioner herein contends that he "was assigned an attorney who would cut his teeth on this as 'my first capital case.' (Vol. III R. p. 609.)" This comment was made by Mr. Marty White at an ex-parte hearing that occurred on April 28, 1993. *(See* Vol. III R. p. 558 *et seq.)* Mr. White was not a trial defense attorney for petitioner; thus, petitioner's reference on post-conviction relief is misplaced.

Mr. Edward Greenlee was one of the defense attorneys appointed to represent petitioner after Mr. Michael Mitchell, initially one of the defense attorneys, informed the trial court that he had a personal conflict in the case. *(See* Motion for Appointment of Additional Counsel filed 1/20/93; 2/25/97, Supp. R. pp. 3944-45.) The court minutes reflect that Mr. Greenlee represented petitioner from as early as petitioner's arraignment on February 3, 1993. *(See* court minutes R. p. 1.)

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The trial court subsequently allowed Mr. White to withdraw from the case. Mr. Tyrone Brown was appointed as an additional defense attorney to represent petitioner. Mr. Brown's involvement in the case began at least by July 20, 1993, as evidenced in the court record by Mr. Brown's Motion to Transfer to Parish Prison. *(See* 2/25/97, Supp. R. pp. 4061-62.) Mr. Brown was present in court representing petitioner on July 23, 1993. *(See* court minutes R. p. 6.)

Both Mr. Brown and Mr. Greenlee represented petitioner at trial. Petitioner's complaint that Mr. White had no prior defense experience as a capital litigator is thus irrelevant to the present case since Mr. White never represented petitioner at trial.

Petitioner also complains that the prosecutor's argument concerning credibility of witnesses somehow amounted to ineffective assistance of counsel on the part of the defense trial attorneys. The prosecutor's argument was a proper comment on the evidence presented and was in accord with the trial court's guilt phase jury instructions regarding credibility of witnesses. (Vol. XV tr. pp. 81-83; R. pp. 3742-44.)

B. Counsel investigated and prepared mitigation evidence

Petitioner's allegation that his trial attorneys failed to investigate or prepare mitigation evidence is without merit. An ex-parte hearing conducted by the trial court with defense counsel on April 28, 1993, evidences the fact that defense counsel actively sought appointment of

mitigation experts to investigate any possible mitigation evidence. The trial court granted funds for a mitigation investigator and for mitigation experts. Dr. John Bolter, a clinical neuropsychologist, and Dr. Cecile Guin, two mitigation experts, were called to testify on behalf of petitioner during the penalty phase. Dr. Brian T. Jordan, a clinical psychologist, was additionally retained by the defense and performed a batter of tests. Jordan's report was arguably the least favorable to petitioner, reinforcing counsels' decision not to call him as a penalty phase witness.

Petitioner also contends that the defense trial attorneys did not discuss any statutory mitigating factors with prospective jurors during voir dire. This allegation is belied by the entire voir dire transcript, in which defense counsel repeatedly asked jurors if they could consider (1) petitioner's youth, (2) the possibility that at the time of the offense petitioner did not appreciate the criminality of his conduct or conform his conduct to the requirements of law because he was impaired as a result of mental disease or defect or intoxication, and (3) any other relevant mitigating circumstance. All jurors who could not consider such evidence were dismissed for cause by the trial court.

Petitioner further contends that defense trial counsel failed to present evidence of petitioner's hyperactivity, mental defects, and abnormalities. This is not true. Vella Brumfield, defendant's mother, testified that petitioner's hyperactivity and dysfunctional behavior first became evident when petitioner was in third grade and that she even "took a course in psychology" herself in order to deal

with his behavior problems. (Vol. XVI tr. p. 67; R. p. 3825.) Ms. Brumfield testified at length concerning medication petitioner took for hyperactivity and his history of being treated at a Greenwell Springs facility, Independence Home, a Ponchatoula facility, and Margaret Dumas' mental health facility. (Vol. XVI tr. pp. 67-71; R. pp. 3825-29.) Further, she described punishment petitioner had undergone at the hands of a stepfather and seizures petitioner had suffered. (Vol. XVI tr. pp. 71-75; R. pp. 3829-33.)

ThurmaEllis, petitioner's father, testified during the penalty phase. He stated he had heard that petitioner was abused by his stepfather when petitioner was young. (Vol. XVI tr. pp. 86-87; R. pp. 3844-45.)

Karen Cross, petitioner's fourth-grade teacher, testified that petitioner was at times a disruptive student who had problems. She further indicated that petitioner was placed in a behavior disorder class in fifth grade. (Vol. XVI tr. pp. 88-91; R. pp. 3846-49.)

Theodis Brumfield, petitioner's brother, also testified. He described punishment petitioner's stepfather meted out to petitioner. He said he witnessed petitioner's seizures. (Vol. XVI tr. pp. 93-97; R. pp. 3851-55.)

Dr. Cecile Guin, a social worker who testified as an expert, outlined petitioner's background from birth. She said "[t]here are some indications that he was born with slower responses than normal babies." (Vol. XVI tr. p. 115; R. p. 3873.) She described petitioner's problems in school

and his problems with an abusive stepfather. (Vol. XVI tr. pp. 118-21; R. pp. 3876-79.) She, too, spoke of petitioner's hyperactivity as "the learning disability he was diagnosed with." (Vol. XVI tr. p. 121; R. p. 3879.) Moreover, she testified about petitioner's being placed in group homes or mental health facilities and that petitioner had been given various types of medication for his mental and behavioral problems. (Vol. XVI tr. pp. 122-32; R. pp. 3880-90.)

Dr. John Bolter, who testified as an expert in neuropsychology, stated that petitioner had educational problems, that petitioner suffered from attention deficit disorder, that petitioner had an antisocial disorder, and that petitioner had an. I.Q. of seventy-five. (Vol. XVI tr. pp. 146-49; R. pp. 3904-07.)

The court record clearly shows that the defense not only investigated mitigating circumstances but also presented mitigation evidence during the penalty phase of the trial. Petitioner's contentions to the contrary are meritless.

C. Petitioner's trial counsel presented mitigating evidence.

Contrary to petitioner's claims, his trial attorneys presented mitigating evidence from several witnesses. Six mitigation witnesses testified before the jury, and a seventh mitigation witness—Drusilla Thomas, employed by the Louisiana Office of Human Services—was called but did not testify before the jury since her office had no records of neglect or abuse regarding petitioner. Two of

petitioner's mitigating witnesses were qualified as experts in their respective fields.

In response to petitioner's allegations in subsection B of this claim, the state has outlined specific testimony of the mitigation witnesses. Additionally, petitioner here asserts that "there was no investigation to define whether Kevan Brumfield had organic brain damage." (Petitioner's supplemental brief p. 16.) This is not true. Dr. John Bolter testified that he gave petitioner "a comprehensive battery of tests that are sensitive to brain functions . . . . to determine to what extent . . . he [petitioner] may be manifesting any kind of neurological deficits in cognitive functions." (Vol. XVI tr. pp. 145-46; R. pp. 3903-04.) Dr. Bolter was asked if he detected organic brain amnesia from his tests on petitioner. Dr. Bolter stated:

> Well, one of the things I'm looking for is whether there is any suggestion of a neurological basis for any memory loss. He doesn't offer any complaints. He doesn't say, I have memory loss, per se' [sic]. But when you test him, what you find quickly is that he does show a rapid rate of forgetting that we generally think as being an organic amnesia; meaning, that it's related to some kind of disturbance in his brain. However, if he's had an opportunity to hear the information repeatedly, he can acquire and he can retain and it appeared to be more a product of his attention deficit disorder.

(Vol. XVI tr. pp. 146-47; R. pp. 3904-05.) Dr. Bolter testified that petitioner had an antisocial personality disorder, and unfortunately for petitioner, this type of disorder is consistent with the criminal activity of petitioner as alleged by the state.

Petitioner's claim that defense trial counsel did not "aggressively seek this family history evidence" of abuse of petitioner is likewise without merit. (Petitioner's supplemental brief p. 17.) Petitioner's mother, father, and brother testified as to petitioner's abuse at home. Dr. Guin also testified as to petitioner's claims of abuse by a stepfather.

D. Defense counsel's penalty phase closing argument did not constitute ineffective assistance of counsel.

Petitioner asserts that the defense attorney's closing argument during the penalty phase constituted ineffective assistance of counsel because the attorney "presented only the argument that 'death is wrong'" and "[t]here was no recitation of the statutory mitigators and how they might apply." (Petitioner's supplemental brief p. 19.) The transcript of defense counsel's argument reveals otherwise.

Mr. Brown, the defense attorney, spoke of sympathy for the Smothers family. He then argued:

> But then, you see on the other side of the courtroom, you see Kevan Brumfield's family.

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> They have hurt. In the lap of Kevan Brumfield's mother lies Kevan Brumfield's five-year-old daughter. It's said to me that murder lives, not only lives with the victims, but it lives with the family of the person convicted of the crime. So not only are you going to affect Kevan Brumfield by the death penalty, you're going to affect his family, you're going to affect the kids that will never see him again. It's only fair that if you do this that you know what you're doing, that it's a considered decision that you make. Life imprisonment is life imprisonment. He'll never get out. It's without benefit of parole, probation, suspension of sentence. Risk to society is gone.

(Vol. XVI tr. p. 165; R. p. 3923.) This argument by the defense attorney was particularly calculated to sway the jury toward voting for life imprisonment, and the defense attorney was allowed to make the above statements without objection since La. Code Crim. P. art. 905.2B did not become effective until December 23, 1995.

Mr. Brown also implored the jury to scrutinize the testimony of the state's witnesses—Anthony Miller, Edna Perry, and Trina Perkins. The defense attorney characterized petitioner's involvement in a 1989 shooting incident regarding a drug deal as "a case where Kevan turned state's evidence. He testified against the person that did the shooting." (Vol. XVI tr. pp. 165-66; R. pp. 3923-24.) This argument was made in spite of the fact that the argument was not truthful and had no basis in the evidence presented.

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Mr. Brown further argued that the testimony of Dr. Guin and Dr. Bolter and the report of Dr. Jordan all led to the conclusion that defendant should be sentenced to life imprisonment.

He stated:

> What we did try to provide to you were the whole facts; that Kevan was born two and a half or three and a half pounds, very low birth weight, and his problems began from there. We tried to explain to you what that low birth weight meant in terms of neurological problems and its subsequent social problems. Ms. Burns testified that there was no organic brain damage and no neurological problems. That's not what Dr. Bolter said. Dr. Bolter said there were some organic memory problems, attention deficit, a borderline I.Q., and when asked whether that - those problems which occurred from birth, because of no fault of Kevan, coupled with additional social problems, and those social problems include things like the existence of six father, stepfathers, in and out of his life at a very young age, the placement into fourteen schools, in and out of different schools, being bounced back and forth from one place to the other, being placed in group homes from the age of twelve, being bounced back and forth to six different group homes, the type of medication that he received at a young age. Dr. Bolter got up and testified as to - to the strength of thorazine and

mellaril, antipsychotic medicine that Kevan was given while at Margaret Dumas and while at another mental health facility. Kevan had problems from the very outset. And the point of what we were saying is that all those problems added up, not one independent of the other. A culmination of a lot of things brought Kevan to the state in which he is right now, right where he is right now. And we talked about abuse in the home, and again, Ms. Bums goes over the

the mitigation factors in - in the book, and again, when we were involved in the selection process we all discussed that you can consider any relevant mitigating circumstance, things that you consider relevant to the relevance of Kevan's life, in terms of seeing whether, you know, things were got to a point that they were beyond his control and that has to do with his background. That has to do with the abuse of his stepfather upon a child that was born with problems to begin with; a child that has problems dealing with a breakup of his mother; a child that had a mother that was from an abusive home; and as Dr. Guin testified, had an emotional detachment from the children, through no fault of her own, and that that detachment is related to the abuse that she suffered herself; a father who was - who cared for Kevan and his brother but was unable at that point, because of things in his life, to give them the attention that they needed, the direction that they needed.

(Vol. XVI tr. pp. 168-69; R. pp. 3926-27.) Mr. Brown then listed the benefits of the jurors' vote for life imprisonment and reiterated both the "good sides to Kevan" as testified to by petitioner's fourth-grade teacher and the harsh upbringing petitioner endured. The defense attorney asked the jury again to consider the mitigating evidence testified to by Dr. Bolter. Mr. Brown ended his argument to the jury with a plea for the jurors to consider petitioner's family members and children, who "[hadn't] done anything." (Vol. XVI tr. pp. 170-72; R. pp. 3928-30.)

It is, therefore, clear that petitioner's trial attorney did argue mitigating circumstances to the jury. Petitioner's allegations that Mr. Brown's closing statements amounted only to a plebiscite on the death penalty is unfounded.

E. Rebuttal questioning of Dr. Guin did not amount to ineffective assistance of counsel.

On post-conviction relief, petitioner claims the defense trial attorney was ineffective in his rebuttal questioning of Dr. Guin because he "forgot" to rehabilitate her testimony concerning her views on the death penalty. The state contends that the defense attorney's questioning of this witness amounted to tactical decisions, not ineffective assistance of counsel.

The cross-examination of Dr. Guin revealed that she had not reviewed all the evidence pertinent to the offense. Her bias against the death penalty was, therefore, insignificant in light of the entirety of the case. There is no

evidence to suggest that the defense attorney's rebuttal examination of this witness prejudiced the outcome of this case.

F. The trial court record was fully preserved for review on appeal.

Petitioner on post-conviction relief alleges defense trial counsel was ineffective for failing to preserve the court record. The state maintains that all necessary portions of the trial transcript were recorded. Sidebar conferences were recorded in a manner to insure that the jury would not hear the arguments of the defense counsel and the prosecutor, as well as any statements made by the trial court. As in any case, any non-verbal movements possibly made by any party are incapable of audio recordation. The Louisiana Supreme Court considered petitioner's arguments concerning unrecorded bench conferences and specifically found that petitioner "failed to demonstrate that any prejudice resulted" from the fact that some of the bench conferences may not have been recorded. *Brumfield*, 96-2667 at pp. 14-16, 737 So.2d at 669-70. Thus, because the Louisiana Supreme Court has found that no prejudice occurred, petitioner cannot succeed under the *Strickland* two-pronged standard, which includes a requirement of proof of prejudice to petitioner due to the constitutional ineffectiveness that occurred.

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G. Failure to object to the state's argument did not constitute ineffective assistance of counsel since all arguments asserted by the prosecutor were proper.

Petitioner now contends that his trial counsel was ineffective for failing to object to the state's closing argument. Specifically, petitioner claims that his defense trial counsel should have objected to the prosecutor's comment that petitioner's gun misfired when petitioner held a gun to Anthony Miller's head and pulled the gun's trigger only days before the Smothers murder. Petitioner also asserts that the defense trial attorney should have objected to testimony of petitioner's prior allegations of police coercion in the Clinton armed robbery case.

These arguments made by the prosecutor were proper. The misfiring of petitioner's gun in the Clinton armed robbery case constituted part of the facts of that crime, thus any objection to this argument would have been correctly overruled. Furthermore, the Louisiana Supreme Court has already determined that the prosecutor made no improper comments in closing arguments. The court stated:

> In the present case, the prosecutor did not suggest that defendant or his attorney did anything improper in attempting to suppress the confession in the earlier case. Rather, the prosecutor pointed to record evidence that this case was not the first one in which defendant had unsuccessfully claimed a confession was

> coerced. Because the jury had already rejected defendant's claim of a coerced confession in the guilt phase of this case, we conclude that the comments about defendant's claim of a coerced confession in a different case did not inject an arbitrary factor into the jury's deliberations during the penalty phase. Furthermore, the prosecutor's statement about defense counsel's cross-examination of police officers was a fair comment pointing out the frequently used strategy of attempting to shift the focus from the accused to the accuser.

Brumfield, 96-2667 at p. 9, 737 So.2d at 666. Failure to lodge an unmeritorious objection does not amount to ineffective assistance of counsel.

H. Petitioner did not receive ineffective assistance of counsel by defense counsel's failure to raise petitioner's capacity to proceed as an issue.

Petitioner contends his trial attorneys were ineffective because of their failure to raise petitioner's capacity to proceed as an issue. The state submits there was no evidence of petitioner's incapacity to proceed; therefore, this claim lacks merit.

Dr. Bolter's suggestion to give petitioner stimulant medication during court sessions has been taken out of context by petitioner on post-conviction relief. Dr. Bolter concluded:

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> The issue of his attentional difficulties also seems to be suggestive of an early attention deficit/hyperactivity disorder that is a combined type. This condition is not severe enough to interfere with his ability to assist counsel in his own defense. However, his attentional skills may be somewhat taxed during monotonous or repetitive courtroom activities and it may be reasonable to treat this patient with an appropriate stimulant medication in order to maximize his capacity to attend.
>
> Additionally, the results of the Georgia Competency Test yielded a raw score of 40, suggesting that he has adequate simple knowledge of the courtroom and proceedings, as well as the charges, consequences and recollection of the events leading up to his arrest to be judged competent for trial. The Bennett criteria were also reviewed and he has an awareness of the nature of the proceeding against him and the ability to assist in his own defense. No other specific accommodations need be made in considering his current capacity to assist with his counsel.

(Vol. II R. p. 276.) From Dr. Bolter's report, it is clear that petitioner's capacity to proceed was not in doubt. Dr. Bolter's statement that petitioner's attention skills may be taxed was a purely speculative statement made prior to trial without Dr. Bolter's ever having observed petitioner's demeanor and physical condition while

actually in court. There is in fact nothing in the record to suggest petitioner had any difficulty in assisting counsel during the numerous and lengthy motion hearings prior to the actual trial. Stimulant medication was suggested merely to combat the "monotonous or repetitive courtroom activities" and not because petitioner lacked capacity to proceed. Petitioner's allegations of ineffectiveness are unfounded.

I. Defense counsel effectively examined prospective jurors during voir dire.

Petitioner claims that the defense trial attorneys failed to conduct an effective examination of prospective jurors. Petitioner specifically states there was "wholesale lack of interaction with prospective jurors on the question of the death penalty," that "[j]urors were not given any information of statutory mitigators," and that they were not questioned as to whether or not they would "automatically" vote for the death penalty. (Petitioner's supplemental brief p. 26.) These allegations of general ineffectiveness are unfounded.

Voir dire occurred over a two-week period from June 12, 1995, until June 26, 1995.[5] The court was in session each day, except for Sunday, June 25, 1995. The voir dire transcript of this case is contained in nine volumes of court record.[6] A review of these volumes absolutely shows

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5. The jury was actually sworn as an entire panel on the morning of June 27, 1995.

6. *See* Vols. IV through XII.

that petitioner's trial attorneys aggressively participated in the voir dire process, that they repeatedly talked to jurors about mitigating circumstances, and that they painstakingly questioned prospective jurors as to whether or not they would automatically vote for the death penalty. The defense trial attorneys obviously made strategic choices about how they would question each juror on an individual basis. Brevity in questioning two jurors does not in any manner reflect ineffectiveness on the part of trial counsel for petitioner, as is alleged by petitioner on post-conviction relief.

CLAIM NUMBER FOUR: Jury misconduct and lack of impartiality requires that the conviction and sentence be overturned.

Without alleging any specific grounds for post-conviction relief as required by La. Code Crim. P. art. 930.3, petitioner makes a bald allegation that "there was apparently at least one instance where a juror made anti-defense gestures in the jury box during the penalty phase of the trial which indicated that the defendant would be sentenced to death. Additionally, there were reports of a familiar relationship being demonstrated following the return of the death sentence in that jurors were seen congregating with the victim's family members." (Petitioner's supplemental brief, p. 27.) Petitioner has not specified how his constitutional

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APPENDIX O — EXCERPTS OF MINUTES OF COURT, NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, ENTERED AUGUST 21, 2003

* * *

NO. 1-93-865

STATE OF LOUISIANA

vs.

KEVAN T. BRUMFIELD

RE: STATUS CONFERENCE

CHARGE: FIRST DEGREE MURDER. This matter came before the Court for status conference, pursuant to previous assignment. The accused was present in court, represented by counsel, Mr. Richard Westerling. Ms. Prem Burns and Ms. Monissa Thompson, Assistant District Attorney, was present for the State of Louisiana. On joint motion of the State and defense counsel, the Court ordered that the matter be continued for motions until October 23, 2003, at 9:00 a.m. Notice was given to the accused and counsel in open court. The State filed Answer to First Amended Petition for Post Conviction Relief.

* * * *

APPENDIX P — BRUMFIELD'S REPLY TO THE STATE'S RESPONSE TO HIS FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF, 19TH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, FILED SEPTEMBER 23, 2003

DOCKET NO. 1-93-865, SECTION II
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA, ex rel. KEVAN BRUMFIELD

versus

BURL CAIN, Warden of Louisiana State Penitentiary

STATE OF LOUISIANA

DEATH CASE

BRUMFIELD'S REPLY TO THE STATE'S RESPONSE TO HIS FIRST AMENDED PETITION FOR POST-CONVICTION RELIEF

Petitioner Kevan Brumfield ("Brumfield") files this reply in answer to the State's Response to his First Amended Petition for Post-Conviction Relief. In reply, petitioner states as follows:

INTRODUCTION

1. This memorandum will not attempt to reply to each of the responses offered by the State. Rather, it will touch only on several of the issues raised in the petition. Brumfield asks that the Court not assume that a failure to

specifically reply to any point raised by the State indicates acquiescence in the State's position, rather such a failure is simply a view that further briefing of those issues is not likely to aid the Court at this time.

MENTAL RETARDATION

2. Brumfield seeks an evidentiary hearing on the issue of mental retardation. In doing so, Brumfield has pointed to a variety of references from the trial record supporting his claim. The state responds that Brumfield has failed to make a sufficient showing to trigger a hearing.

3. In arguing that Brumfield has failed to sufficiently substantiate his claim of mental retardation and, thereby, to require a hearing, the State cites *State v. Tate,* 01-1658 (La. 5/20/03) 851 So. 2d 291, in which the Supreme Court found the defendant was not entitled to a *post-Atkins* hearing. Despite the States citation of *Tate* the defendant in that case bears little resemblance to Brumfield.

4. Tate, unlike Brumfield, attended school through the 11th Grade and reportedly was able to function on a seventh or eighth grade level. He was 26 years old at the time of the offense. Additionally, there was apparently no evidence that Tate: (a) had any learning disabilities; (b) was a low birth weight baby; (c) had slower than normal responses at birth; or (d) had ever been placed in a psychiatric hospital. Yet, all of these indicators of mental retardation are present in Brumfield's case.

5. Perhaps most importantly, during Tate's trial there was expert testimony that Tate did not meet the definition

of mentally retarded which is used in Louisiana. In essence, Tate's claim was belied by an expert opinion offered at trial which stated that he was not mentally retarded.

6. While the State attempts to argue that the testimony of Dr. John Bolter was similar to that offered by the expert in *Tate*, this is simply not the case. During Brumfield's trial while there was some intelligence related testimony, there is a complete absence of testimony or evidence dealing directly with the issue of mental retardation.

7. As stated in the First Amended Petition for Post-Conviction Relief there is substantial evidence that Brumfield is mentally retarded. Moreover, Brumfield at this stage is not required to conclusively carry his burden of proving mental retardation, but rather to set forth sufficient facts to support a reasonable ground to believe that he is mentally retarded. It is this showing which triggers the hearing. It is this showing, which has been made by Brumfield in this petition.

INEFFECTIVENESS OF COUNSEL CLAIMS

8. Brumfield suggest that despite the State's responses, he has alleged serious and glaring instances of ineffective assistance of counsel. This is particularly so with regard to the penalty phase of his trial. Moreover, Brumfield has recently learned that penalty phase counsel, Tyrone C. Brown, was disbarred by the Supreme Court of Louisiana on March 22, 2002. *See* Attachment. While the allegations which led to Brown's disbarment

do not relate directly to Brumfield's case, they do at a minimum raise serious questions about Brown competency to practice law at the time he represented Brumfield during the penalty phase of the trial.

9. Brumfield suggests that an evidentiary hearing is required to look into the effectiveness of Tyrone Brown in light of the specific allegations set for in the petition, as well as the disbarment order of the Louisiana Supreme Court.

OTHER CLAIMS

10. Brumfield submits that to the extent factual support for his other claims is lacking, that the combined lack of time and money have prevented him from fully developing his claims for relief. Accordingly, Brumfield requests that he provided with additional time to amend and supplement his petition and that he be provided with funds to hire an investigator and/or experts to assist in fully developing his claims for relief. Brumfield will, prior to the hearing on procedural bars, be submitting a separate motion for funding in this matter.

CONCLUSION

11. For all the foregoing reasons, Petitioner asks that the Court grant him the relief requested in his First Amended Petition for Post-Conviction Relief and that the Court order an evidentiary hearing on petitioner's claims in this matter.

APPENDIX Q — EXCERPTS OF APPLICATION OF KEVAN BRUMFIELD FOR SUPERVISORY WRITS, LOUISIANA SUPREME COURT, FILED JANUARY 8, 2004

KEVAN BRUMFIELD,

Petitioner/Applicant,

VERSUS

STATE OF LOUISIANA,

Respondent.

On Application for Supervisory Writs from the October 23, 2003 Denial of PETITIONER'S *PETITION FOR POST-CONVICTION RELIEF,* and *FIRST AMENDED PETITION OF POST-CONVICTION RELIEF,* by the Honorable Richard D. Anderson, Judge, Nineteenth Judicial District Court for the Parish of East Baton Rouge, in Docket No. 1-93-865, Section II

CAPITAL CASE

APPLICATION OF KEVAN BRUMFIELD FOR SUPERVISORY WRITS AND APPENDIX OF EXHIBITS

* * *

January 8, 2004

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* * *

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING TO EITHER GRANT BRUMFIELD'S EIGHTH AMENDMENT CLAIM BASED ON HIS MENTAL RETARDATION OR TO HOLD AN *ATKINS* HEARING IN LIGHT OF THE SUBSTANTIAL RECORD EVIDENCE SUPPORTING BRUMFIELD'S MENTAL RETARDATION CLAIM

The United States Supreme Court recently held in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) that the execution of individuals with mental retardation violates the Eighth Amendment of the federal constitution because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 122 S.Ct. at 2251. According to the *Atkins* Court, defendants with mental retardation are not as culpable as fully functioning adult persons because they

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather

> than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability.

Id. at 2250-51.

Thus, in *Atkins*, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court concluded that the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S.Ct. at 2252.[1]

In *Atkins*, the Court began by establishing that a fundamental "'precept of justice'" is that "'punishment for crime should be graduated and proportioned to the offense.'" 122 S. Ct. at 2246 (internal citations omitted). The Court made clear that determining whether a punishment is constitutionally excessive or cruel and unusual[2] is judged by current norms, not by those which existed at the time the Eighth Amendment was ratified. *Id.* at 2247. The core Eighth Amendment concept is the "'dignity of man'" and thus its constitutional content must

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1. Quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

2. The Court left no doubt that the Eighth Amendment prohibits "all excessive punishments as well as cruel and unusual punishments which may or may not be excessive." *Id.*

be informed by "'the evolving standards of decency that mark the progress of a maturing society.'" 122 S.Ct at 2247 (*quoting Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The evolving standard, the Court declared, should be informed by "objective factors" to the maximum extent possible, the most reliable evidence of which is found in state legislative enactments and jury verdicts. *Id.* However, the Court adhered to the constitutional principle that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* (*quoting Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

With these principles established, the Court first reviewed the legislative record. The Court was impressed with the fact that at the time of *Penry*, only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders. 122 S. Ct. at 2248. However, since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. The Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 2249. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Court with"powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* The Court relied also upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* In its search for a national consensus, the Court also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, *id.* at

2249, *n.* 21, the opposition to the practice by "widely diverse religious organizations,"[3] international practice,[4] and polling data.[5] While "not dispositive," these factors bolstered the Court's opinion that there was a consensus opposing the practice "among those that have addressed the issue." *Id.* Finally, the Court also noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*. *Id.* Since the practice had become "truly unusual," it was "fair to say that a national consensus has developed against it." *Id.*

The consensus reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." 122 S. Ct. at 2250. The Court noted that, due to their impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id.*

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3. The Court noted that representatives of Christian, Jewish, Muslim and Buddhist organizations believed that the execution of persons with mental retardation could not be justified. *Id.*

4. [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.*

5. [P]olling data shows a widespread consensus among Americans, even those that support the death penalty, that executing the mentally retarded is wrong." *Id.*

These impairments and handicaps, while not justifying an exemption from criminal liability, do diminish a mentally retarded person's personal culpability to the extend that neither of the justifications advanced by states in support of the death penalty – retribution and deterrence – would be served by permitting a retarded person's execution. *Id.* Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." 122 S. Ct. at 2252. Since "just desserts" necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* And, because capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will "inhibit criminal actors from carrying out murderous conduct," no deterrence interests are served by imposing the death penalty on the mentally retarded. *Id.* This type of calculus, the Court noted, is at the "opposite end of the spectrum" from behavior of the mentally retarded due to their cognitive and behavioral impairments. *Id.*[6]

In addition to concluding that retention of the death penalty for mentally retarded defendants would not further any legitimate interest in retribution or deterrence, the Court also opined that the reduced capacity of mentally

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6. The Court also concluded that exempting the mentally retarded from capital punishment would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are "not protected by exemption." *Id.*

retarded offenders provided a "second justification for a categorical rule making such offenders ineligible for the death penalty." *Id.* at 2251. Due to their impairments, there were a host of factors – the increased risk of false confessions, difficulties in communicating with counsel, especially with regards to issues involving mitigation, lesser ability to effectively testify on their own behalf or express remorse due to limited communication skill – that, "in the aggregate," carried an unacceptable "risk of wrongful executions" for mentally retarded defendants.[7]

Thus, the Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislature that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id. (quoting Ford v. Wainwright,* 477 U.S. 399, 405 (1986)).

Definition of Mental Retardation

The U.S. Supreme Court in *Atkins* recognized that standardized clinical definitions of mental retardation exist. *Atkins* specifically referred to the definition published by the American Association of Mental Retardation (hereinafter AAMR), the nation's oldest and

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7. The Court also noted the danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes" which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. *Id.*

largest professional organization in the field of mental retardation, and the adoption of that same definition by the American Psychiatric Association (hereinafter APA). Id. at 2245 n. 3.

The 2002 AAMR definition of mental retardation provides:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.

AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002). This definition consists of three primary diagnostic criteria: limitations in intellectual functioning, limitations in adaptive behavior, and onset preceding age eighteen. This basic tripartite definition has been adopted by the AAMR, the APA, and the American Psychological Association, and is widely used and accepted amongst individual practicing professionals.

Mental retardation is assessed using well-established, valid and reliable tests and procedures. There are specific instruments that test for each of the three. Valid and reliable I.Q. tests normalized on the general population have been around for some time. The standard instrument for this determination is the Wechsler Adult Intelligence Scales-III (WAIS-III). *Atkins*, 122 S.Ct. at 2245n.5.

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The ninth edition of the AAMR definition, cited by the Supreme Court in *Atkins*, also recognized the uncertainty in I.Q. measurement, defining "significantly subaverage intelligence" as an I.Q. of "approximately 70 to 75," taking into account measurement error. *Atkins*, 122 S.Ct. at 2245 *n.*3. The DSM-IV-TR requires an I.Q. score of "about 70 or below," and adds a statement concerning measurement error, and an example of a Weschsler IQ of 70 as representing in actuality a range of 65 to 75. DSM-IV-TR, *supra*, at 41. The DSM-IV also notes that measurement error may vary from instrument to instrument. *See id.*

The second criterion for a diagnosis of mental retardation refers to limitations in conceptual, social and practical skills. These are skills that people have learned so that they can function in their everyday lives. Limitations in adaptive behaviors impact a person's daily life and affect the ability to respond to a particular situation or to the environment. Examples of adaptive skills include: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Atkins*, 122 S.Ct. at 2245 *n.*3. Currently, in the tenth edition of the AAMR, the adaptive behavior skills have been refined as follows:

Conceptual Skills-

Receptive and expressive language
Reading and writing
Money concepts
Self-directions

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Social Skills-

Interpersonal
Responsibility
Self-esteem
Gullibility (likelihood of being tricked or manipulated)
Naivete
Follows Rules
Obeys laws
Avoids victimizations

Practical Skills-

Personal activities of daily living such as eating, dressing, mobility and toileting.
Instrumental activities of daily living such as preparing meals, taking medication, using the telephone, managing money, using transportation and doing housekeeping activities.
Occupational skills
Maintaining a safe environment

Ex. 1.

Under the Standard and Accepted Scientific and Diagnostic Criteria, and the Applicable Jurisprudence the District Court was Required to Hold an Evidentiary Hearing and, Following that Hearing, to Find that Kevan Brumfield is Mentally Retarded.

The *Atkins* decision has been applied to Louisiana Cases in several recent decisions of this Court. The most detailed review of the state of the law post-*Atkins* is found in *State v. Williams,* 01-1650 (La. 2002) _ So. 2d _.

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While noting that "not everyone faced with a death penalty sentence will automatically be entitled to a post-*Atkins* hearing," the *Williams* Court held that "[i]t will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. A defendant's entitlement to a post-Atkins hearing will be made on a case-by-case basis." *Id.* at 16.

In *Williams* this Court focused on various factors in determining that the record supported a *post-Atkins* hearing including that:

> defendant is an individual who: 1) was 16 years of age at the time of the murder, still within the "developmental stage" by any definition of that term; 2) will not be 22 years of age until 2003, still within the development stage by Louisiana's statutory definition; 3) has an IQ within the range used in the diagnosis of mental retardation; 4) suffered from lead poisoning as an infant and had numerous mental health commitments prior to the age of 15; 5) was enrolled in "special ed" classes; and 6) has not had the issue of mental retardation put before the fact finder in light of the *Atkins* restriction on the death penalty. Thus, this court concludes the defendant is entitled to an evidentiary hearing which will give him an opportunity to prove he is mentally retarded pursuant to the definitions of LSA-R.S. 28:381, and, under Atkins, not subject to the death penalty. Defendant's case will be remanded to the trial

court for an evidentiary hearing on the issue of mental retardation only.

Williams, at 16.

Like Williams, petitioner's case is accompanied by a host of objective facts which raise the issue of mental retardation. Kevan Brumfield was 20 years of age at the time of the murder and still within the developmental stage set by the Louisiana statutes. His IQ score as determined shortly before the trial was 75, on the low end of the intelligence scale and he was reading at approximately a Fourth Grade level. (R. Vol. XVI, pp. 3904, & 3907-08).

He was born on January 7, 1973. He arrived prematurely and his birth weight was 3.5 pounds or less. (R. Vol. XVI, pp. 3821 & 3872).[8] Medical records which were recovered for this period indicate "that he was born with slower responses than normal babies " (R. Vol. XVI, p. 3873). He remained hospitalized for two to three months after he was born. (R. Vol. XVI, pp. 3821 & 3873-74).

From childhood, Brumfield suffered severe, uncontrolled seizures. (R. Vol. XVI, pp. 3832 & 3854). As a child, he was prescribed numerous medications including: Thorazine, Mellaril, Ritalin, Artane, and Vistaril. (R. Vol. XVI, pp. 3826, 3829, 3881-82, 3884 & 3906). He was also treated, as a child and an adolescent, at two psychiatric hospitals. (R. Vol. XVI, pp. 3825, 3829, 3881 & 3884).

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8. The record volume numbers correspond to the volume numbers in the Louisiana Supreme Court's copy of the district court record.

Appendix Q

As early as third grade issues regarding Brumfield's learning and behavioral disabilities were noticed by his teachers. Once diagnosed, Brumfield spent a significant amount of his schooling in special education classes. (R. Vol. XVI, pp. 3846-49). Eventually, at approximately 10 years of age, Brumfield was identified as having some form of learning disability. (R. Vol. XVI, pp. 3881-82).

Brumfield suffers from mental retardation. He has an IQ score of approximately 75, he has deficits in adaptive behaviors, and his condition existed before the age of eighteen. By definition, his personal culpability in the murder is diminished and his execution will not serve the two penological goals of the death penalty, and therefore, he cannot be executed.

Moreover, under the applicable standards set forth in *Williams*, Brumfield was entitled to a evidentiary hearing on his mental retardation claim and the district court's failure to grant him a hearing on this claim was error.

* * *

OTHER CLAIMS AND ISSUES

Brumfield raised a variety other claims including:

1. His conviction and sentence were obtained with a confession that was not voluntary and intelligent but instead was coerced. Particularly in light of Brumfield's history of brain dysfunction, his alleged confession cannot be considered reliable.

Appendix Q

2. The trial court's jury charge and the jury's verdict form failed to include various lesser included offenses *(e.g.,* attempted first degree murder, attempted second degree murder, attempted involuntary manslaughter, robbery, attempted robbery) for which there was a factual basis in the record.

3. The prosecutor improperly presented and relied on evidence of aggravating factors other than those enumerated in Louisiana Code of Criminal Procedure article 905.4.

4. The trial court improperly restricted Brumfield's presentation of mitigating circumstances.

5. While the jury's verdict form suggests that three aggravating circumstances applied, the record contains no indication that the jury was unanimous as to any single aggravating circumstance.

6. The trial court improperly failed to instruct the jury that each juror could consider any mitigating circumstance without the concurrence of any other juror.

7. Prejudicial hearsay concerning other crimes allegedly committed by Brumfield was improperly allowed.

8. The trial court improperly allowed the prosecution to cross-examine one expert (Dr. Cecile Guin) with

a hearsay statement from the report of another expert who never testified at trial, particularly when the hearsay statement concerned alleged, unindicted conduct in 1989 when Brumfield was still a minor, particularly when the trial court never cautioned the jury that it could consider such cross-examination testimony solely for the purpose of evaluating the weight to give the testifying expert's testimony and that it could not use such testimony as direct evidence against Brumfield.

9. The trial court's jury charge as to "reasonable doubt" was constitutionally inadequate under *Cage, Sullivan, Humphrey,* and similar cases.

10. The trial court erroneously allowed the prosecutor to attack Brumfield's character on the basis of pre-trial actions and defenses pursued by his counsel.

11. Death by lethal injection as prescribed under Louisiana law is cruel and unusual.

12. As long as he is incompetent, Brumfield cannot be executed.

13. From the time of his arrest to the present date, Brumfield has been indigent.

Each of these claims, as well as the other raised in the previous sections required additional time to develop

and funding for investigators and experts. Under La. R.S. 15:149.1 and otherwise, Brumfield is entitled to funds for his counsel to investigate his claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts (including without limit for a magnetic resonance imaging (MRI) of Brumfield's brain, for neurologists, psychiatrists, and other medical doctors to review Brumfield's medical records and to examine his person, an expert on the use of hypnosis-induced testimony, and a criminologist). However, the Legislature has not yet allocated any amounts to fund this statutory mandate. Thus, until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.

Because undersigned counsel have not been provided funds for their representation, for retaining any experts, or otherwise and have not had adequate resources to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside.

CONCLUSION

For these reasons, this Court should grant applicant's writ application, reverse the lower court's judgment, and grant his petition for post-conviction relief or, in the alternative, reverse the lower court's judgment and remand for an evidentiary hearing on the claims contained in the petition for post-conviction relief.

APPENDIX R — MEMORANDUM IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 USC §2254, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, FILED SEPTEMBER 7, 2005

United States District Court
for the
Middle District of Louisiana

CIVIL ACTION NO. 04-787-D-MS
(MAGISTRATE NOLAND)

KEVAN BRUMFIELD,

Petitioner

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent

MEMORANDUM IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 USC § 2254

STATEMENT OF THE CASE

Petitioner Kevan Brumfield was indicted on February 3, 1993, with the January 7, 1993, first degree murder of Baton Rouge Police Department Corporal Betty Smothers, a violation of La. R.S. 14:30. (Indictment number 1-93-865, R. p. 67.) On February 12, 1993, petitioner, represented by counsel, was formally arraigned, and petitioner entered

his own plea of not guilty as charged. Both the state and defense filed various pretrial motions, and the trial court took appropriate actions on all such motions.

Petitioner's trial began on June 12, 1995. Voir dire was completed on the morning of June 27, 1995, when the entire jury panel was sworn and impaneled to serve as jurors in the case. That jury unanimously found defendant guilty of first degree murder on July 2, 1995. The penalty phase of the trial was conducted on July 3, 1995, and after deliberations on that same day, the jury deliberated and returned a sentence of death. That jury found the following aggravating circumstances applicable: (1) petitioner was engaged in the perpetration or attempted perpetration of armed robbery; (2) the victim was a peace officer engaged in her lawful duties; and (3) the offender knowingly created a risk of death or great bodily harm to more than one person. The trial judge sentenced petitioner on September 18, 1995, to death in accordance with the jury's determination.

Petitioner subsequently appealed his conviction and sentence to the Louisiana Supreme Court. He assigned as error the following: (1) petitioner received ineffective assistance of counsel because (a) the preparation and presentation of the penalty phase defense was assigned to an attorney with no previous experience in capital litigation, (b) defense trial counsel failed to investigate and prepare mitigation evidence, (c) defense trial counsel failed to question prospective jurors in a manner to allow for the intelligent use of peremptory challenges, (d) defense trial counsel presented no mitigating evidence, (e) defense trial

counsel presented an unacceptable, irrelevant argument in the penalty phase, (f) defense trial counsel failed to rehabilitate defense witness Dr. Cecile Guin concerning her views on the death penalty, (g) defense trial counsel failed to preserve the penalty phase record by allowing arguments to be heard and rulings to be made off the record, (h) defense trial counsel failed to object during the penalty phase to the state's arguments concerning petitioner's uncharged misconduct and petitioner's prior allegations of police misconduct, and (i) defense trial counsel failed to raise as an issue petitioner's capacity to proceed since one expert recommended stimulant medication to enhance petitioner's ability to assist counsel; (2) the trial court erred in admitting testimony of Ms. Kimen Lee because she was hypnotized to refresh her recollection of the crime and her recollection of the crime changed after the hypnosis; (3) the trial court erred in not providing a contemporaneous record of objections and rulings; (4) during the penalty phase, the prosecutor improperly appealed to prejudice and passion (a) by referring to petitioner's uncharged misconduct, (b) by alluding to petitioner's future dangerousness, (c) by referring to petitioner's prior allegations of police misconduct, (d) by relying on a mental health examination of petitioner, (e) by presenting improper victim impact evidence, and (f) by mischaracterizing petitioner's involvement in a 1989 homicide and failing to release exculpatory evidence about this homicide; (5) the trial court erred in denying challenges for cause as to prospective jurors Mr. Dayle Smith, Mr. Wayne Keith Bahr, and Ms. Monica Salviaggio; (6) the trial court erred in limiting the defense's presentation of mitigating evidence at the penalty phase;

(7) the trial court erred in forcing the defense to back strike and use its peremptory challenges before a full panel of jurors was selected; (8) the trial court erred (a) in denying the defense resources to obtain an expert analysis of the audio portion of petitioner's confession, (b) in denying the defense resources to obtain an expert witness regarding prison life, and (c) in frustrating the defense by its involvement in funding issues; (9) the trial court erred in denying petitioner's motion for change of venue; (10) the trial court erred in placing unreasonable restrictions on questioning during voir dire and in applying an incorrect legal standard in qualifying jurors; (11) the trial court erred in ruling on discovery motions regarding the initial offense report and co-conspirator statements; (12) the trial court erred in denying the motion to suppress petitioner's statements; (13) in deciding petitioner's guilt, the jury incorrectly listed as an aggravating factor that the victim Baton Rouge City Police Corporal Betty Smothers was a peace officer engaged in the performance of her lawful duties; (14) the trial court gave the jury an improper instruction regarding reasonable doubt; and (15) petitioner's Fourteenth Amendment due process right and Fifth and Eighth Amendment right to counsel were violated by the state's system of joint funding of the judiciary and prosecution. The Louisiana Supreme Court affirmed petitioner's conviction and sentence. *State v. Brumfield*, 96-2667 (La. 10/20/98); 737 So.2d 660.

Petitioner next applied to the United States Supreme Court for a writ of certiorari and/or review. Petitioner therein alleged that (1) Louisiana's criminal court fund was unconstitutional, (2) petitioner's due process rights

were violated as set forth in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and (3) petitioner's due process rights were violated by the prosecutor's penalty phase closing argument. The United States Supreme Court denied review. *Brumfield v. Louisiana*, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999).

Petitioner filed an application for post-conviction relief on March 16, 2000, in the state trial court. He made the following generalized allegations: (1) he received ineffective assistance of counsel due to defense counsel's failure to present testimony of any medical doctor concerning Brumfield's medical history and condition; (2) he received ineffective assistance of counsel due to defense counsel's failure to object to hypnosis-induced testimony of witness Kimen Lee and to present any expert testimony on hypnosis; (3) he received ineffective assistance of counsel due to grounds set forth in his direct appeal to the state supreme court; (4) the trial court should have excused jurors Wayne Bahr, Dayle Smith, Terry Teekell, and Mary Binning for cause; (5) the trial court was not impartial because the district attorney and trial judge share financial resources of the criminal court fund; (6) the trial court should have suppressed petitioner's confession; (7) the trial court improperly denied petitioner fees for an audio expert; (8) during the penalty phase, the trial court improperly allowed the testimony of Anthony Miller, Eddie Stewart, Edna Perry, and Trina Perkins and improperly allowed evidence of petitioner's prior criminal convictions and criminal conduct to be admitted; (9) the prosecutor improperly argued that petitioner

had previously attempted to murder Anthony Miller in Clinton, Louisiana; (10) the prosecutor improperly introduced evidence of a misdemeanor battery conviction to emphasize in her closing argument that petitioner would present a risk of future dangerousness in prison; (11) the prosecutor improperly argued petitioner was involved in a murder committed in 1989; (12) the prosecutor improperly introduced evidence of petitioner's attempted possession of cocaine and felony theft of a gun offenses to justify the death penalty; (13) the trial court improperly allowed Clinton Police Chief Eddie Stewart to testify that petitioner had asserted a defense of coercion with respect to a confession given in an unrelated case committed by petitioner; (14) the prosecutor improperly prejudiced the jury against petitioner by quoting petitioner's own coarse language; (15) the trial court improperly restricted petitioner's presentation of mitigating circumstances in some unspecified manner; (16) the prosecutor introduced duplicative, cumulative testimony during the penalty phase; (17) the trial court's jury charges were unconstitutional in numerous respects; (18) Louisiana's lethal injection statute constitutes cruel and unusual punishment, violates due process, and is impermissibly vague; and (19) petitioner cannot be executed as long as he is, as alleged, insane.

The state submitted that all issues that petitioner had previously raised on direct appeal or inexcusably failed to raise in the trial court or on appeal were procedurally barred. The remaining issues petitioner raised -- specifically, those contentions of ineffective assistance of counsel -- were vague and nebulous allegations which do

not specify with reasonable particularity the factual basis for which relief could be granted. The state, therefore, asserted that petitioner's application should be dismissed in its entirety as procedurally barred. Only in the alternative did the state respond to petitioner's allegations of ineffective assistance of counsel on the merits and submitted that relief should be denied.

Petitioner subsequently filed a response to the state's answer, and on June 16, 2003, petitioner filed a First Amended Petition for Post-conviction Relief. The amended petition was designed to incorporate and replace the original petition.[1] In it, he presented the following issues for review: (1) the Eighth Amendment prohibits execution of the mentally retarded as set forth in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), an evidentiary hearing should be held regarding this issue, and petitioner should be declared mentally retarded; (2) cumulative error renders the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for various enumerated reasons, specifically (a) because of the penalty phase of trial, (b) because of the overall cumulative impact on the trial, (c) because penalty phase counsel was not properly qualified, (d) because counsel failed to investigate and prepare mitigating evidence, (e) because counsel failed to present mitigating evidence, (f) because the penalty phase argument was unacceptable and irrelevant, (g) because counsel failed to rehabilitate a social worker's testimony, (h) because counsel did not ensure production of a complete record, (i)

1. *See* state motions transcript dated October 23, 2003, p. 2.

because counsel failed to object to penalty phase evidence offered by the state, (j) because counsel failed to raise the issue of petitioner's capacity to proceed, and (k) because counsel failed to properly voir dire prospective jurors; (4) petitioner's conviction and sentence should be overturned due to juror misconduct and impartiality; and (5) other listed claims constituted error.

On October 23, 2003, the trial court held a hearing regarding petitioner's claims. Petitioner indicated that the amended petition incorporated everything in the original petition, and the amended petition was designed to replace the original. (10/23/03, "Post Conviction Relief" volume.[2]) The trial court ruled as follows: (1) petitioner did not carry his burden placing the claim of mental retardation at issue, and petitioner was not entitled to an *Atkins* hearing; (2) petitioner's cumulative error claim was dismissed because there was no showing that the conviction was constitutionally unreliable, petitioner did not specify with reasonable particularity the factual basis for this claim and did not allege a claim which, if established, would entitle petitioner to relief; (3) petitioner's ineffective assistance of counsel claims were either procedurally barred or without merit, as the trial court specified in its ruling; (4) petitioner's issue of juror misconduct was not proper grounds for post-conviction relief, there was no objection to the alleged misconduct in the trial court, and insufficient grounds were alleged with particularity;

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2. The record volume containing this transcript is not enumerated. It is identified in the court record as "Post-Conviction Relief Volume." For this reason, record page numbers are not provided.

petitioner's claim of lack of juror impartiality due to pretrial publicity was dismissed because the issue of a venue change was unsuccessfully raised on appeal and, additionally, the claim was not grounds for post-conviction relief; and (5) petitioner's group of enumerated claims were dismissed because, as specified, the claims were not proper grounds for post-conviction relief, the claims were not alleged with sufficient particularity, or the claims were already raised on appeal. Petitioner was given to November 24, 2003, to file a writ as to the ruling with the Louisiana Supreme Court. The trial court subsequently granted petitioner an extension of time until January 8, 2004, to file his writ with the state's supreme court.

On January 8, 2004, he timely filed the writ. Therein, he alleged: (1) the district court erred in failing to grant relief on the *Atkins* claim and erred in failing to hold an evidentiary hearing as to petitioner's alleged mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) juror misconduct and impartiality due to pretrial publicity required reversal of the conviction and sentence; and (5) other listed claims, along with a lack of funding, constituted error. The Louisiana Supreme Court denied petitioner's writ without any opinion. *Brumfield v. State*, 04-0081 (La. 10/29/04), 885 So.2d 580.

Petitioner filed the present application for federal habeas corpus relief on November 4, 2004. He presents the following issues to this court for review: (1) the state court erred in failing to grant relief on the *Atkins* claim

and erred in refusing to hold an evidentiary hearing on petitioner's claim of mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) juror misconduct and impartiality due to pretrial publicity required reversal of the conviction and sentence; and (5) other listed claims, along with a lack of funding, constituted error.

It appears that petitioner has exhausted his state judicial remedies with respect to all claims he has presented in the instant petition. The application for federal habeas corpus relief is timely. No evidentiary hearing is required. The state submits that adequate and independent state procedural bars foreclose relief to petitioner on many of his claims and that the state court rulings on the merits are entitled to a presumption of correctness.

STATEMENT OF FACTS

On January 7, 1993, Kevan T. Brumfield, Henri Broadway, and West Paul went to Citizen's Bank and Trust on Jefferson Highway in Baton Rouge to commit an armed robbery at the bank's night depository. West Paul drove the car and remained in the vehicle. Brumfield, armed with a .380 caliber handgun and Broadway, armed with a .25 caliber pistol, lay in wait in some bushes immediately adjacent to the night depository.

A marked Baton Rouge City Police Department vehicle driven by Corporal Betty Smothers, a fourteen-

year veteran of the police force, pulled up to the night depository. Smothers was working in an off-duty capacity for the purpose of escorting Piggly Wiggly Grocery Store Manager Kimen Lee to the bank. Brumfield and Broadway simultaneously ambushed the police unit. Brumfield fired six shots into the driver's window. Five of the shots struck Smothers in the forearm, head, back, and shoulder. At least one of the shots was fired as close as eighteen inches to three feet from the officer. Two of Brumfield's shots also hit passenger Lee. Broadway fired five shots from the rear passenger side of the vehicle. Two rounds were recovered in the unit. At least two rounds struck Lee. Lee managed to drive the vehicle from the passenger side with the bank deposit bag untouched. Lee survived the attack with eleven bullet holes in her body to the left breast, left and right buttocks, and right thigh. She was able to identify Henri Broadway as having looked into the unit at the end of the attack. Lee has subsequently suffered from post-traumatic stress disorder brought about by the crime.

Brumfield was arrested pursuant to a warrant. He gave an initial videotaped statement claiming to be the driver of the getaway vehicle. He later admitted to being the shooter of Corporal Smothers.

At trial, petitioner did not take the stand at either phase of the trial. He alleged the defense of alibi despite an eyewitness' having seen him and Broadway in the Piggly Wiggly store where Corporal Smothers was working in uniform some ninety minutes prior to the murder. Brumfield had an extensive criminal history

including prior felony convictions. A psychologist testified that defendant was a sociopath. Victim impact testimony showed Corporal Smothers to be a hard-working single mother of six minor children. She was active in the community.

ARGUMENT

PROCEDURAL BAR TO CLAIMS 2, 4, and 5: The merits of three of petitioner's claims raised in this habeas petition were never presented to the state courts because the state courts dismissed these claims pursuant to adequate and independent state procedural bars.

The state district court dismissed claim numbers 2, 4, and 5 raised in this federal proceeding. In his application for post-conviction relief, petitioner raised the instant claims. The state district court dismissed these claims pursuant to La. Code Crim. P. art. 930.4 A and C, by La. Code Crim. P. art. 930.3, by La. Code Crim. P. art. 926 B (3) and E, or by La. Code Crim. P. art. 928. Thus, the issues raised in these claims are barred under state law.

Since this ruling was based on state statutory procedural bars, petitioner is barred from asserting them in this federal forum. This procedural-default rule applies when a state court has declined to review a petitioner's claims because the petitioner has failed to comply with state procedural rules. *Coleman v. Thompson*, 501 U.S. 722, 751, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87-88, 97 S.Ct. 2497, 2506-2507, 53 L.Ed.2d 594 (1977); *Shaw v. Collins*, 5 F.3d

128, 131 (5th Cir. 1993). Except where the petitioner can show cause for the procedural default and actual prejudice, federal courts lack jurisdiction to review the merits. *Shaw*, 5 F.3d at 131. The Supreme Court of the United States has held that the comity and federalism concerns that underlie the exhaustion requirement are equally applicable when claims have been procedurally defaulted. *Magouirk v. Phillips*, 144 F.3d 348, 357 (5th Cir. 1998) (citing *Coleman*).

In the present case, the state district court reviewed petitioner's application for post-conviction relief and dismissed these claims based on established state law precedent. As required by the adequate-and-independent-state-ground doctrine, the Louisiana courts have clearly and expressly relied on a procedural bar independent of any federal claim. In *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991), the United States Supreme Court reiterated that the procedural-default rule bars federal habeas corpus action unless a state court reaches the merits of a federal claim. But in the present case, the state courts clearly and expressly relied on the statutory procedural bars and dismissed the claims.

Regarding claim number 2, the cumulative error claim, the trial court stated in part that "it does not specify with reasonable particularity the factual basis and does not allege a claim which if established would entitle the petitioner to relief." (10/23/03, motion tr. p. 4; "Post Conviction Relief" volume.) The trial court's dismissal of this allegation is based on La. Code Crim. P. art. 926 B (3), which states that "[t]he petition shall allege ... [a] statement of the grounds upon which relief is sought,

specifying with reasonable particularity the factual basis for such relief." Subsection E contained in that article provides that "[i]nexcusable failure of the petitioner to comply with the provisions of this Article may be a basis for dismissal of his application." La. Code Crim. P. art. 928 states that a post-conviction relief application "may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle the petitioner to relief."

Petitioner's claim number 4—jury misconduct and lack of impartiality—was dismissed procedurally on post-conviction relief. The trial court ruled as follows:

> [T]he defendant claims that anti-defense gestures were made by a juror and reports of familiar relationship being demonstrated following the jury's return of the death sentence. This is not grounds for post-conviction relief, even if it was set out with enough particularity, and, therefore—well actually—and it's also something that should have been raised on appeal, and I guess I'll ask Mr. Westling, why wasn't it raised on appeal?
>
> * * * * *
>
> All right. Well, the bottom line is that does not fall within the grounds for post-conviction relief, in any event, and therefore, that will be dismissed based on that. The second part of his claim is that the jury lacked impartiality due to

> pretrial publicity. The issue of a venue change was unsuccessfully raised on appeal, and in addition to that, again, it is also not grounds for post-conviction relief as set out in 930.3. Therefore, that one will be dismissed.

(10/23/03, motion tr. pp. 10-11; "Post-Conviction Relief" volume.) Thus, petitioner's claim number 4 was procedurally dismissed in accordance with La. Code Crim. P. art. 930.3 and 930.4 A.

Petitioner's claim number 5 consists of a listing of "other claims and issues." This listing of claims is identical to claims listed in petitioner's state application for post-conviction relief. The trial court on post-conviction relief ruled that all of these claims should be dismissed because they were either not proper grounds for post-conviction relief under La. Code Crim. P. art. 930.3, were already decided on appeal and thereby dismissed under La. Code Crim. P. art. 930.4 A,[3] or were dismissed because petitioner failed to pursue the issue on appeal under La. Code Crim. P. art. 930.4 C.

The trial court on post-conviction relief specifically stated:

> The Court: . . . Claim number 5 is a group of claims, paragraphs 91 through 100, which each

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3. For the claims that have already been considered on direct appeal, the state submits that these rulings are subject to a presumption of correctness because the state courts did not act contrary to federal law.

set out claims that are I guess separate from each other, and I'll take those one at a time; although, I will say that my reading them, none of these are actually claims that fall within the enumerated grounds for post-conviction relief, and some have already been raised on appeal. Paragraph 91 refers to the coerced confession. That issue was raised on appeal. Therefore it will be dismissed. Paragraph 92, jury charge and verdict form failed to include various lesser included offenses, for example, attempted first degree murder, et cetera. I'm not sure why that wasn't raised on appeal, which would be the time to challenge the juror—I'm sorry, the jury charge, but the law is clear that that is not a responsive verdict set out in the code of criminal procedure. And again, just to the record is clear, why wasn't that raised on appeal?

Mr. Westling: I can't answer that, judge. Not having handled the appeal makes that difficult to understand.

The Court: That one will also be dismissed. Paragraph 93, prosecutor improperly presented and relied on improper aggravating factors. Again, this is not grounds for post-conviction relief. It's something that should be handled on appeal. Can you answer why it was not?

Mr. Westling: I'm sorry?

The Court: Do you have any reason why it was not?

Mr. Westling: No, I don't.

The Court: All right. That is dismissed. Paragraph 94, the trial court improperly restricted the defendant's presentation of mitigating circumstances. That was raised on appeal unsuccessfully. Therefore, that is dismissed. Paragraph 95 alleges there was no indication that the jury's verdict was unanimous. Again this is not something that's set out in the grounds for post-conviction relief. It's also something that should have been handled on appeal, and I assume—

Mr. Westling: The same answer.

The Court: --You don't know why.

Mr. Westling: Exactly, your Honor.

The Court: In any event, that is dismissed. It's not grounds and should have been handled on appeal. The trial court failed to properly instruct the jury. The same response, it's not grounds under 930.3 and should have been handled on appeal. And I assume, again, you didn't handle it. You can't answer why it was not.

Mr. Westling: That's correct, your Honor.

The Court: That one is dismissed. Paragraph 97, prejudicial hearsay concerning other crimes was improperly allowed. That was argued on appeal and litigated on appeal, and therefore, that will be dismissed. Paragraph 98, hearsay issue relating to the state's cross-examination of social worker. That was appealed and litigated on appeal, and therefore, that will be dismissed. Paragraph 99, reasonable doubt instructions were constitutionally inadequate. This was raised on appeal. Therefore, it will be dismissed. Paragraph 100, the trial court allowed the state to attack the defendant's character on an improper basis. And again, that was appealed, and like all of these paragraph 91 through 100, it's not proper grounds for post-conviction relief.

In the defendant's reply to the state's response to the amended petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under 930.3, and it's not set out with enough particularity. Therefore, it will be dismissed.

(10/23/03, motion tr. pp. 11-14; "Post-Conviction Relief" volume.) Petitioner's fifth set of claims is subject to dismissal now on federal habeas corpus review.

Appendix R

Because the state court dismissed petitioner's claims pursuant to adequate and independent state procedural grounds, this court should not consider these claims. Petitioner failed to properly preserve these issues for appellate or state post-conviction review. Therefore, he has waived his opportunity to assert these claims in federal court. Furthermore, petitioner offers no explanation for this procedural default in state court. This court, therefore, need not reach the merits of these claims.

MERITS OF PETITIONER'S CLAIMS PREVIOUSLY DECIDED BY STATE COURTS: The state courts did not act contrary to federal law in ruling on the merits of petitioner's claims, and these rulings are entitled to a presumption of correctness; this court should thus dismiss the application for writ of habeas corpus.

According to clear statutory requirements, an application for writ of habeas corpus shall not be granted unless the adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(1) & (2). Petitioner, therefore, must rebut the state courts' factual determinations by clear and convincing evidence, but he makes no reference to this standard of review. 28 U.S.C. § 2254 (e)(1); *Jackson v. Johnson*, 150 F.3d 520, 524 (5th Cir. 1998). Instead, petitioner attempts merely to relitigate the claims he asserted in state court

by arguing as if this court were reviewing the claims *de novo.* Moreover, he presents the identical arguments as those made to the state courts. Because petitioner has not met the requirements established in 28 U.S.C. § 2254 (d)(1) and (2), this court should dismiss the claims in this application for writ of habeas corpus.

The state's highest court has considered the merits of many of petitioner's claims and found that relief to petitioner was unjustified. These findings are entitled to a presumption of correctness.

Petitioner makes no showing that the state court incorrectly applied the law or unreasonably determined the applicable facts. To be sure, he fails to cite any cases that cast doubt on the resolution of his claim in state court.

Nowhere in his application for habeas corpus relief does petitioner demonstrate that the state court incorrectly failed to meet the burden of proof required by the AEDPA. The state courts rendered decisions and resolved factual issues in a manner entirely reasonable and supported by the record.

Petitioner's first claim—that the state court erred in failing to grant relief on the *Atkins* claim and erred in refusing to hold an evidentiary hearing on petitioner's claim of mental retardation—was correctly decided by the state courts. The trial court ruled as follows:

> I guess the biggest one we need to address is the claims of mental retardation and *Atkins*

and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.

The cases way that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

(10/23/03, motion tr. pp. 3-4; "Post-Conviction Relief" volume.)

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That petitioner had a full mental understanding of the legal proceedings against him was further evidenced during post-conviction relief proceedings. As the trial court was giving its ruling concerning petitioner's ineffective assistance of counsel claims, all of which were being decided against petitioner, petitioner interrupted the trial court, and the following colloquy occurred:

> The Defendant: Excuse me. May I say something? If you're going to deny all of this here, I don't even need to be here, you know.
>
> The Court: Well, you need to be there, and you need to be quiet or we are going to put you in the tank—
>
> The Defendant: I don't need to do nothing.
>
> The Court: --and you can listen to this.
>
> The Defendant: I don't need to do nothing. You're prejudiced against me. I know this. You ain't going to change your damn mind. I ain't going to sit here and let you deny all of this bullshit.
>
> The Court: You know what, you're right. You're not going to sit here.
>
> The Defendant: This is bullshit. That's right.
>
> The Court: We need to take him to the tank right now.

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> The Defendant: This is bullshit. You know it, mother fucker. You're prejudiced. I know this. That's why you are doing all this against Todd Lee. You think I don't know? I know what kind of judge you is. You're a fucking house judge. That's right.
>
> Reporter's Note: At this time the defendant was escorted out of the courtroom.

(10/23/03, motion tr. p. 8; "Post-Conviction Relief" volume.) Clearly, petitioner's outburst evidences the fact that petitioner had the mental capacity to comprehend what was occurring as the trial court was making its ruling during post-conviction relief proceedings. The state submits the trial court's determination was correct, reasonable, and comported with clearly established federal law as determined by the United States Supreme Court.

Petitioner's second claim—that a cumulation of error renders the conviction and sentence constitutionally unreliable—was denied both procedurally and on the merits in state court. The trial court ruled:

> That brings up to claim number 2, the is the cumulative error. I've read that and the claim, number 2. He doesn't provide any evidence of error in that claim. There is no showing of how the accumulation of error in this case renders the conviction unconstitutionally reliable. It does not specify with reasonable particularity the factual basis and does not allege a claim which if established would entitle the petitioner to relief, so that claim is dismissed.

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(10/23/03, motion tr. p. 4; "Post-Conviction Relief" volume.)

In petitioner's claim number 3 herein, he contends he received ineffective assistance of counsel at trial in violation of his Sixth Amendment rights. Petitioner specifically alleges that he received ineffective assistance of counsel petitioner (a) because of the overall cumulative impact on the trial, (b) because penalty phase counsel was not properly qualified, (c) because counsel failed to investigate and prepare mitigating evidence, (d) because counsel failed to present mitigating evidence, (e) because the penalty phase argument was unacceptable and irrelevant, (f) because counsel failed to rehabilitate a social worker's testimony, (g) because counsel did not ensure production of a complete record, (h) because counsel failed to object to penalty phase evidence offered by the state, (i) because counsel failed to raise the issue of petitioner's capacity to proceed, and (j) because counsel failed to properly voir dire prospective jurors. Petitioner initially claimed on direct appeal that his trial attorneys rendered ineffective assistance of counsel in a number of ways; however, all such contentions were relegated to post-conviction proceedings. *See State v. Brumfield,* 96-2667, pp. 13-14 (10/20/98), 737 So.2d 660, *cert. denied* 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999).

All of petitioner's claims he now presents on federal habeas corpus review were presented on the merits during state post-conviction proceedings. The state submits all issues regarding alleged constitutional deficiency of counsel were correctly decided in the state courts and should be upheld on federal habeas corpus review. The

trial court on post-conviction relief gave extensive reasons for denying petitioner's ineffective assistance of counsel claims:

> Claim number 3 is ineffective assistance of counsel, and ineffective assistance of counsel is actually broken down into several sub-parts. The first part being that the penalty phase counsel was not properly qualified for the trial of this case. In support of that in the application the defendant claims that—or actually quotes Marty White as the defense attorney talking about this being his first capital case. The record's clear that trial counsel was Ed Greenlee and Tyrone Brown, and even though Marty White was in it for a while he did withdraw and was replaced by Tyrone Brown. Therefore, the claim is without merit and definitely does not meet the Strickland standard. In section A, the application also argues that it was ineffective assistance of counsel because trial counsel argued against the death penalty instead of presenting mitigating evidence. The record's clear there was mitigation evidence presented, and it's true the defense attorney did argue against the death penalty. The court sees that as a strategic decision on the part of the defense attorney and, therefore, that would not meet Strickland. It does not state a claim that would entitle the petitioner to relief, so that is also dismissed. Section B, entitled counsel failed to investigate and prepare to offer mitigating

evidence. However, I read the record or parts of the record and it's real clear that mitigation evidence was presented. There were six witnesses, two experts, his mother, his brother, his father, his, I think, fourth grade or second grade teacher, and it was probably as much mitigation evidence in that case as any I've seen.

Again, that's not supported by the record and, therefore, it does not state a claim that would entitle him to relief and definitely does not meet the Strickland standard. Therefore, that one is dismissed. In subsection B there was also a claim that counsel presented no information about how the defendant might cope with incarceration, and that was unsuccessfully argued on appeal and, therefore, it is barred. Section 3 of ineffective assistance of counsel entitled counsel completely failed to present mitigating evidence. Again, six witnesses, the record shows there was other—or there was mitigating evidence including Dr. Bolter, Dr. Guinn, the mother, brother, the father, and the teacher, and, therefore, that is unsupported and will be dismissed being without merit.

Section D entitled counsel presented an unacceptable and irrelevant argument in the penalty phase. This is that—the debate of the argument is that the defense attorney should have argued more about mitigating factors and less about the death penalty in general.

Again, this is strategy and definitely would not meet the Strickland standard and, therefore, is dismissed.

Section E is counsel failed to rehabilitate the social worker on the issue of her attitude toward the death penalty. This is another matter that goes to strategy, and I read that and I kind of wondered. I'm not sure whether that's even possible that she could be rehabilitated on the death penalty. The fact that she is against it, she is against it. She is sworn to tell the truth and I assume she tells the truth, and whether or not she is for or against the death penalty, I'm not sure how that would affect her testimony on the stand and the information that she relayed to the jury. In any event, that's something that would not meet the Strickland standard, and therefore, it's dismissed. And actually it's a strategy matter, so I'm not sure it's even ineffective assistance at all.

Subsection F entitled counsel failed to ensure a complete record of the trial court proceeding. This was raised on appeal, and the supreme court found that counsel failed to show any prejudice from the bench conferences not being on the record, and no evidence was listed in the petition indicating how the defense was prejudiced by this. So I'm going to agree with the supreme court on this. That's procedurally barred. It's already been handled on appeal, so it will be dismissed.

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Subsection G, counsel failed to oppose and/or object to improper evidence offered by the state during the penalty phase. This has already been litigated on appeal, and the supreme court found that it was appropriately introduced by the state. So subsection G, that claim is dismissed.

Subsection H, failed to raise issue of mental incapacity. From reviewing the record, those same reports, Dr. Bolter's report in particular, there is not evidence of incapacity, and since there is none, I'm not sure why any attorney would raise it if there is no evidence to support it. Therefore, that also—subsection H, that claim will be dismissed.

Subsection I, claims that the defense attorney failed to conduct proper examination of jurors. Cross-examination again is something that is really related to strategy, and I'm not sure specifically what the problem is or what the alleged problem is with the cross-examination—or I should say proper examination of the jurors. Although the record, I believe there was two weeks of voir dire and I can't remember how many pages of testimony taken, and it does appear that they were pretty aggressive in examining the jurors. I fail to see how the defense was prejudiced at all. It definitely does not meet the Strickland standard and, therefore, the claim in subsection I is also dismissed.

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* * * * *

> . . . The very last part of the ineffective assistance of counsel, counsel for the defendant filed a response to the state's response to the application and set out in there that the defense attorney, Tyrone Brown, was disbarred in March of 2002, and that was for assisting a nonlicensed person in practicing law. That was in 2002. It doesn't have anything to do with him actually representing this defendant, and it sounds like it was unrelated to him representing defendants, but instead allowed somebody else to practice law who is not licensed. Therefore, that does not state a ground even if established that could result in the defendant being granted relief, so that one is also dismissed.

(10/23/03, motion tr. pp. 4-7, 10; "Post-Conviction Relief" volume.) Clearly, the trial court employed the *Strickland* standard for ineffective assistance of counsel in the present matter. Furthermore, the trial court's decision does not reflect an unreasonable application of that standard to the facts of the instant case. The state court's decision should be given a presumption of correctness, and relief to petitioner should be denied.

Regarding petitioner's claim number 5 entitled "Other Claims and Issues," petitioner contends that petitioner "raised a variety [of] other claims" (petitioner's brief p. 35), and merely lists those claims without making specific allegations of fact in reference to the listed claims. Some

of the listed claims were barred procedurally on state post-conviction relief and some of those claims were found to be meritless on direct appeal. The claims determined to be meritless on direct appeal now deserve to be given a presumption of correctness on federal habeas corpus relief. A list of petitioner's other listed claims found to be without merit, along with the corresponding cite in the state opinion wherein the issue was disposed of, are as follows:

1. His conviction and sentence were obtained with a confession that was not voluntary and intelligent but instead was coerced. Particularly in light of Brumfield's history of brain dysfunction, his alleged confession cannot be considered reliable. *Brumfield*, 96-2667, pp. xvii-xxiv (La. 10/20/98).

* * * * *

4. The trial court improperly restricted Brumfield's presentation of mitigating circumstances. *Brumfield*, 96-2667, pp. xxx-xxxii (La. 10/20/98).

* * * * *

7. Prejudicial hearsay concerning other crimes allegedly committed by Brumfield was improperly allowed. *Brumfield*, 96-2667, pp. 3-7 (La. 10/20/98), use of other crimes evidence affirmed.

8. The trial court improperly allowed the prosecution to cross-examine one expert (Dr. Cecile Guin)

with a hearsay statement from the report of another expert who never testified at trial, particularly when the hearsay statement concerned alleged, unindicted conduct in 1989 when Brumfield was still a minor, particularly when the trial court never cautioned the jury that it could consider such cross-examination testimony solely for the purpose of evaluating the weight to give the testifying expert's testimony and that it could not use such testimony as direct evidence against Brumfield. *Brumfield,* 96-2667, pp. 5-7 (La. 10/20/98).

9. The trial court's jury charge as to "reasonable doubt" was constitutionally inadequate under *Cage, Sullivan, Humphrey,* and similar cases. *Brumfield,* 96-2667, pp. xxvi-xxvii (La. 10/20/98).

10. The trial court erroneously allowed the prosecutor to attack Brumfield's character on the basis of pretrial actions and defenses pursued by his counsel. *Brumfield,* 96-2667, pp. 3-9 (La. 10/20/98).

11. Death by lethal injection as proscribed under Louisiana is cruel and unusual. *Brumfield,* 96-2667, pp. 16-19 (La. 10/20/98).

12. As long as he is incompetent, Brumfield cannot be executed. *See* 10/23/03, motion tr. pp. 3-4; "Post-Conviction Relief" volume, decided on the merits at post-conviction relief.

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13. From the time of his arrest to the present date, Brumfield has been indigent. *Brumfield*, 96-2667, pp. viii-xi, xxxii-xxxiii (La. 10/20/98), funding issues upheld on appeal.

The state maintains that all matters considered on the merits during state court proceedings should be afforded a presumption of correctness. The state court correctly applied the law and reasonably determined the applicable facts. Petitioner has failed to demonstrate that the state court did not meet the burden of proof required by the AEDPA. Petitioner's conviction and sentence should be upheld on federal habeas corpus relief.

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CONCLUSION

The state contends petitioner's conviction and sentence should be affirmed and relief to petitioner denied.

RESPECTFULLY SUBMITTED,

DOUG MOREAU
DISTRICT ATTORNEY

/s/_____
PREMILA BURNS, #4136
ASSISTANT DISTRICT ATTORNEY

By: /s/_____
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APPENDIX S — EXCERPTS OF PETITIONER'S FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, FILED OCTOBER 1, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
CASE NO. 04-787-D-M2

KEVAN BRUMFIELD,

Petitioner

V.

BURL CAIN, Warden,

Respondent

PETITIONER'S FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Kevan Brumfield, through undersigned counsel, hereby files his First Amended Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254.

INTRODUCTION

Before presenting the amended claims, Mr. Brumfield demonstrates that he was not given the opportunity to develop and uncover facts supporting his claims while he was in state post conviction proceedings.

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Prior to the adoption of La.R.S. 15:149.1,[1] death sentenced prisoners in Louisiana did not have a right to the appointment and assistance of counsel to pursue state collateral review of their conviction and sentence. In order to assist death row inmates, the Louisiana State Bar Association's Committee on Post-Conviction Representation would seek to encourage pro bono counsel to take on the representation of these individuals. Following a meeting of the Committee and potential lawyers at the Eastern District Chief Judge's courtroom, Richard Westling, Mr. Brumfield's prior counsel, agreed in 1999 to represent Mr. Brumfield.

La.R.S. 15:149.1 delgated the responsibility of providing counsel for post conviction litigation to the Louisiana Indigent Defense Assistance Board (LIDAB). LIDAB fulfilled its obligations by contracting with the Capital Post-Conviction Project of Louisiana (CPCPL), a not-for-profit corporation. CPCPL opened for operation in May 2001. CPCPL began directly representing death row inmates following direct appeal affirmances.

Part of the arrangement between LIDAB and CPCPL was that CPCPL could not use any of its funding to provide expert and investigative assistance to cases in

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1. La.R.S. 15:149.1, provides in pertinent part: "In a capital case in which the trial counsel was provided to an indigent defendant and in which the jury imposed the death penalty, the court, after imposition of the sentence of death, shall appoint the Indigent Defense Assistance Board, which shall promptly cause to have enrolled counsel to represent the defendant on direct appeal and in any state post-conviction proceedings, if appropriate."

which CPCPL lawyers were not directly representing the client as counsel of record. As a result, CPCPL lawyers were able to hire experts and investigators for their cases through the funding it received from LIDAB. However, pro bono counsel could not use these funds and instead could only file requests for such funding to the district courts having jurisdiction over the post conviction proceedings. (At that time, there was no agency with a "pot" of money in which the district courts could order to pay for the necessary services.)

The Louisiana Supreme Court directly addressed this problem in *State ex rel. Williams v. State*, 888 So.2d 792 (La. 2004). Williams brought a due process and an equal protection challenge based upon the funding arrangement. The court framed the contentions as follows:

> First [Williams] suggests that those represented by the Capital Post-Conviction Project of Louisiana (CPCPL) get more funding than he does and this fact disadvantages him. Second, he claims that the fact that he has to litigate his funding requests while those who have representation from CPCPL do not have to do so disadvantages him.

Williams, 888 So.2d at 792-93.

After outlining the facts contained in the record and analyzing the applicable statutes, the court determined that it appeared LIDAB was not fulfilling its obligations found in La.R.S. 15:151.2E(2). That statute provides

in pertinent part, that LIDAB "shall also adopt rules regarding the provision of reasonably necessary services associated with the [post conviction litigation], including investigative, expert, and other services." The court stated, "In reviewing the record, the arguments of both the State and the defendant, and the legislation and its history, we note there may be statutory violations in the manner in which the funding is allocated by LIDAB to indigent capital defendants in post-conviction proceedings." *Id.* at 797.

The court then determined that the record needed expanding, noting, "We are particularly interested in the question concerning LIDAB's adoption of a resolution to prohibit the provision of funds for expert witnesses to civil law firms handling capital post-conviction cases on a *pro bono* basis ..." *Id.* The case was thus remanded to the trial court for further hearings.

Immediately following this decision, LIDAB implemented a rule that set forth guidelines for providing expert and investigative resources to all death row inmates, as mandated by 15:151.2E(2). That rule now allows pro bono counsel representing death-sentenced inmates to acquire needed resources and funding for their cases.

The *Williams* decision was handed down on Dec. 1, 2004. Mr. Brumfield filed his original habeas petition in this court on November 4, 2004, therefore, he could not take advantage of the equitable change.

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Mr. Brumfield was, however, diligent in his efforts to obtain the proper funding for experts and investigative assistance while in state court, notwithstanding the peculiar arrangement between CPCPL and LIDAB. In almost each and every pleading filed in state post conviction proceedings Mr. Brumfield complained and prayed for assistance from the courts.

In his original application for post conviction relief, filed on March 16, 2000, Mr. Brumfield pled the following:

> Under Louisiana statutory law and jurisprudence and otherwise, Brumfield is entitled to sufficient time and funds for his counsel to investigate the facts, to develop claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts (including without limit for neurological studies of Brumfield's head, for neurologists, psychiatrists, and other medical doctors to review Brumfield's medical records and to examine his person, an expert on the use of hypnosis-induced testimony, and a criminologist.) Until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.

Petition for Post Conviction Relief, at 19.

On that same day, he filed a motion entitled, Brumfield's Expedited Motion for Order on Petition for Post-Conviction Relief. In that motion, he stated,

> Petitioner, who is indigent, requires the assistance of experts, funds with which to secure that assistance, and time for counsel to develop his claims for relief and the facts in support of those claims.
>
> ...
>
> The Louisiana Supreme Court has consistently ruled in favor of death-sentenced inmates seeking meaningful post-conviction access to state courts. In a series of writ decisions, the Court has ordered district courts to provide funds for experts after counsel has made a showing of need. [citing *State v. Copeland*, 614 So.2d 1245 (La. 1993); *State ex rel. Cage v. Whitley*, 593 So.2d 375 (La. 1992); *State ex rel Deboue v. Whitley*, 592 So.2d 1287 (La. 1992); and *State v. Brown*, 566 So.2d 967 (La. 1990).]

Brumfield's Expedited Motion for Order on Petition for Post-Conviction Relief, at 1, 2.

He continued his requests. In his First Amended Petition For Post-Conviction Relief, he explained:

> Under La. R.S. 15:149.1 and otherwise, Brumfield is entitled to funds for his counsel

> to investigate his claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts (including without limit for a magnetic resonance imaging (MRI) of Brumfield's brain, for neurologists, psychiatrists, and other medical doctors to review Brumfield's medical records and to examine his person, an expert on the use of hypnosis-induced testimony, and a criminologist). However, the Legislature has not yet allocated any amounts to fund this statutory mandate. Thus, until such funds are available to Brumfield, it is premature for this court to address Brumfield' s claims and thus also for the state to schedule any execution date for Brumfield.
>
> Because undersigned counsel have not been provided funds for their representation, for retaining any experts, or otherwise and have not had adequate resources to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside, petitioner will separately seek funding from the this Court and request additional time to amend this petition once funding issues have been resolved.

First Amended Petition For Post-Conviction Relief, at 29.

And in his prayer for relief, he asked the court to "Grant[] him all the resources necessary to the proper presentation of his case." *Id.*

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The court never responded to the requests for expert and investigative funding, and adjudicated his petition on October 23, 2003. Mr. Brumfield then filed an application for writs to review the trial court's denial of relief to the Louisiana Supreme Court. In his application, Mr. Brumfield stated, "Finally, Brumfield asks this Court to order the district court to conduct an evidentiary hearing on the issue of mental retardation and all other issues raised herein, as well as awarding funding and a reasonable time to litigate the issues." Application for Supervisory Writs, at 4. The Supreme Court denied review of the case on October 29, 2004.

Mr. Brumfield submits that he did not fail to present facts supporting his claims of constitutional violations while in collateral review in state court, rather he was not given the opportunity. The apparent equal protection violation regarding the funding of certain cases and not others, those like Mr. Brumfield's, prevented him from developing the facts supporting his claims and fully litigating his claims in state court.

Appendix S

CLAIMS FOR RELIEF[2]

KEVAN BRUMFIELD SUFFERS FROM MENTAL RETARDATION. THEREFORE, HE CANNOT NOT BE EXECUTED, AND HIS SENTENCE OF DEATH MUST BE REVERSED.

Mr. Brumfield is mentally retarded; his sentence of death cannot be carried out because he is ineligible to be executed. At the time of Mr. Brumfield's trial in 1995, the constitutional prohibition against executing persons suffering from mental retardation had not been established. However, in 2002, the United States Supreme Court squarely held in *Atkins v. Virginia* that the Eighth Amendment prohibits executing mentally retarded individuals. In light of the *Atkins* decision, Mr. Brumfield was recently evaluated for the exact purpose of determining his cognitive functioning and adaptive behavior deficits. Mr. Brumfield presents below the objective factors demonstrating that he does in fact suffer from mental retardation.

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2. All facts alleged in this Amended Petition and Original Petition are hereby incorporated into each claim with or without specific reference.

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I. The Eighth Amendment Prohibits Execution of the Mentally Retarded

A. Federal Law Against Execution of the Mentally Retarded

The United States Supreme Court held in *Atkins v. Virginia*, _ U.S._, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that the execution of individuals with mental retardation violates the Eighth Amendment because "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 122 S.Ct. at 2251. Defendants with mental retardation are not as culpable as fully functioning adult persons because they

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions but they do diminish their personal culpability.

Id. at 2250-51.

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In 2002 in *Atkins*, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. Reversing its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court concluded that the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." 122 S.Ct. at 2252 *(quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

In *Atkins*, the Court began by establishing that a fundamental "'precept of justice'" is that "'punishment for crime should be graduated and proportioned to the offense.'" 122 S. Ct. at 2246 (internal citations omitted). The Court made clear that determining whether a punishment is constitutionally excessive or cruel and unusual[3] is judged by current norms, not by those that existed at the time the Eighth Amendment was ratified. *Id.* at 2247. The core Eighth Amendment concept is the "'dignity of man'" and thus its constitutional content must be informed by "'the evolving standards of decency that mark the progress of a maturing society.'" 122 S.Ct at 2247 *(quoting Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)). The evolving standard, the Court declared, should be informed by "objective factors" to the maximum extent possible. The most reliable evidence of these objective factors is found in state legislative enactments and jury verdicts. *Id.* However, the Court adhered to the constitutional principle that "in the end our own judgment will be brought to bear

3. The Court left no doubt that the Eighth Amendment prohibits "all excessive punishments as well as cruel and unusual punishments which may or may not be excessive." *Id.*

on the question of the acceptability of the death penalty under the Eighth Amendment." *Id. (quoting Coker v. Georgia*, 433 U.S. 584. 597 (1977)).

With these principles established, the Court first reviewed the legislative record. The Court was impressed with the fact that in 1989, at the time of *Penry*, only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders. 122 S. Ct. at 2248. However, since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded. The Court noted that it "is not so much the number of States that is significant, but the consistency of the direction of change." *Id.* at 2249. These enactments, "[g]iven the well-known popularity of anticrime legislation," provided the Court with "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* The Court also relied upon the fact that the legislatures passing the laws voted "overwhelmingly in favor of the prohibition." *Id.* In its search for a national consensus, the Court also looked to the opinions of social and professional organizations with "germane expertise," such as the American Psychological Association, *id.* at 2249, n. 21, the opposition to the practice by "widely diverse religious organizations,"[4] international

4. The Court noted that representatives of Christian, Jewish, Muslim and Buddhist organizations believed that the execution of persons with mental retardation could not be justified. *Id.*

practice,[5] and polling data.[6] While "not dispositive," these factors bolstered the Court's opinion that there was a consensus opposing the practice "among those that have addressed the issue." *Id.* Finally, the Court also noted that even in those states that retained the death penalty for the mentally retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*. *Id.* Since the practice had become "truly unusual," it was "fair to say that a national consensus has developed against it." *Id.*

The Court reviewed the legislative landscape in capital jurisdictions and found a significant sea of change since *Penry v. Lynaugh*, 492 U.S. 302, 355 (1989). A substantial number of capital jurisdictions passed legislative exceptions to death-eligibility for persons with mental retardation.[7]

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known

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5. [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Id.*

6. [P]olling data shows a widespread consensus among Americans, even those that support the death penalty, that executing the mentally retarded is wrong." *Id.*

7. Further, virtually all of the jurisdictions that established capital crimes in that time exempted persons with mental retardation. *See, e.g.*, 18 U.S.C. § 3596(c) ("A sentence of death shall not be carried out upon a person with mental retardation.")

> fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.

Atkins, 122 S.Ct. at 2249. After assessing that changed landscape, the Court found that persons with mental retardation have diminished culpability, which is the primary reason for exempting them from the ultimate punishment. The consensus reflected a judgment about the "relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty." 122 S. Ct. at 2250. The Court noted that, due to their impairments, defendants with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses and to understand the reactions of others." *Id.*

These impairments and handicaps, while not justifying an exemption from criminal liability, do

diminish a mentally retarded person's personal culpability to the extend that neither of the justifications advanced by states in support of the death penalty - retribution and deterrence - would be served by permitting a retarded person's execution. *Id.* Retribution in the capital context had been limited to ensuring that "only the most deserving of execution are put to death." 122 S. Ct. at 2252. Since "just desserts" necessarily depends on the culpability of the offender, the most extreme punishment was deemed excessive due to the "lesser culpability of the mentally retarded offender." *Id.* And, because capital punishment can only serve as a deterrent when a crime is the result of premeditation and deliberation, i.e., when the threat of death will "inhibit criminal actors from carrying out murderous conduct," no deterrence interests are served by imposing the death penalty on the mentally retarded. *Id.* This type of calculus, the Court noted, is at the "opposite end of the spectrum" from behavior of the mentally retarded due to their cognitive and behavioral impairments. *Id.*[8]

In addition to concluding that retention of the death penalty for mentally retarded defendants would not further any legitimate interest in retribution or deterrence, the Court also opined that the reduced capacity of mentally retarded offenders provided a "second justification for a categorical rule making such offenders ineligible for the

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8. The Court also concluded that exempting the mentally retarded from capital punishment would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are "not protected by exemption." *Id.*

death penalty." *Id.* at 2251. Due to their impairments, there were a host of factors—the increased risk of false confessions, difficulties in communicating with counsel, especially with regards to issues involving mitigation, lesser ability to effectively testify on their own behalf or express remorse due to limited communication skill—that, "in the aggregate," carried an unacceptable "risk of wrongful executions" for mentally retarded defendants.[9] Thus, the Court concluded that its "independent evaluation of the issue reveals no reasons to disagree with the judgment of the legislatures that have ... concluded that death is not a suitable punishment for a mentally retarded criminal," and thus the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Id. (quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Further, the penological purposes asserted in support of capital punishment are not served by the execution of persons who are less likely to be deterred because they are incapable or less capable of such reasoning. Finally, the Court noted the enhanced vulnerability of persons with mental retardation in the criminal justice system, the likelihood that their disabilities inhibited their ability to present a defense to guilt or punishment, and the "double-edged sword" aspect of mental retardation as mitigating. *Atkins*, at 2249-51. As a result, the Court held:

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9. The Court also noted the danger that a mentally retarded person's demeanor "may create an unwarranted impression of lack of remorse for their crimes" which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger. *Id.*

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> Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.

122 S.Ct. at 2252 *(quoting Ford*, 477 U.S., at 405).

The Court left the details of implementation to the various states. "As was our approach in Ford v. Wainwright with regards to insanity, 'we leave to the States the task of developing appropriate ways to enforce the constitutional restrictions upon its execution sentences.'"

122 S.Ct. at 2250 (citations omitted).

B. State Law Against Execution of the Mentally Retarded

State v. Williams, 2001-1650, (La. 11/1/02), 831 So.2d 835, presented the first opportunity for the Louisiana Supreme Court to address capital punishment in Louisiana post-*Atkins*.

The defendant in *Williams* had been convicted of first-degree murder and had been sentenced to death and was appealing his case when *Atkins* was announced. The Louisiana Supreme Court noted that "[t]he mandate of *Atkins* that the State may not execute a mentally retarded person is retroactive to any case, at any stage of the proceedings, including the instant case, in which the

defendant is facing the of prospect capital punishment." *Williams*, 831 So.2d at 851.

The Court adopted the appropriate definitional parameters of mental retardation as set forth by the American Association of Mental Retardation and the definition found in the Diagnostic and Statistical Manual of Mental Disorders.

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills.
>
> This disability originates before age 18.

MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002)

> The essential feature of Mental Retardation is significantly sub-average general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. The onset must occur before age 18 years. Mental Retardation has many different etiologies and may be seen as a

> final common pathway of various pathological processes that affect the functioning of the central nervous system.

DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000).

Using these criterion, the Court concluded that there is an "apparent universal agreement":

> ... that a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage, i.e., by the age of 22 years.[10]

Williams, 831 So.2d at 853 - 854.

After finding that a defendant had the "burden to provide objective factors that will put at issue the fact of mental retardation," 831 So.2d at 857, the Court remanded the case for an examination of mental retardation based upon two factors, which are pertinent to the instant case. First, the Court recognized that no adaptive skills testing had been done on Mr. Williams because prior to the *Atkins* decision so there were no bases presented for

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10. The Louisiana Supreme Court cited to La. Rev. Stat. § 28:381, which has since been repealed.

a finding. Second, the Court found that *Atkins* changed the landscape for capital defendants who are mentally retarded: "Prior to [appellant's] trial, mental retardation was merely a factor in mitigation. Post *Atkins*, mental retardation is a complete prohibition against imposition of the death penalty according to the United States Supreme Court." *Id.* at 856-57. Consequently, the Court remanded Williams for an evidentiary hearing.

II. Widely-Recognized Definition of Mental Retardation

A. Authoritative Definition of Mental Retardation

While the United States Supreme Court left procedural mechanisms for implementing *Atkins* to the various states, it would not be true to say that the definition of mental retardation is an open question. "[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 122 S.Ct. at 2250. The American Association on Mental Retardation ("AAMR") is the internationally recognized body of multi-disciplinary experts whose evolving definition of mental retardation has been adopted by the American Psychiatric Association and virtually every other body of experts in related fields since 1959. *See* "Definitions of Mental Retardation", Table 2.1, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, AAMR, 10th Ed. (2002), pp. 20-23 (hereinafter "AAMR,

10th Ed."). The international acceptance of the AAMR's clinical definition is reflected in succeeding versions of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) (hereinafter "DSM-IV-TR").

The AAMR 2002 definition of mental retardation is:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.

AAMR, 10th Ed., p. 1.

The *Atkins* Court cites the 9th edition of the AAMR's definition, and the APA's version of the same definition in the DSM-IV-TR, at 2245, n. 3.

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: '*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.'

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MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (emphasis in original).

> The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

More importantly, the opinion's "shorthand" version of the definition reflects the adoption of the clinical judgment that mental retardation is an enduring developmental disability recognized and characterized by its impact on

an individual's ability to function. "[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 122 S.Ct. at 2250. *Compare* "This [2002] definition, like AAMR definitions of the recent past, includes the three broad elements of significant limitations in intellectual functioning, concurrent with and related to significant limitations in adaptive behavior, and manifested during the developmental period." AAMR 10th ed., p. 8.[11]

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11. The Supreme Court's recognition in Atkins of a national consensus arising out of the clinical definitions of mental retardation should come as no surprise, for the mental health community has long agreed to the diagnostic criteria for determining mental retardation. "Mental retardation is universally defined as (1) significant limitations in general intellectual functioning, (2) which exist concurrently with significant limitations in adaptive functioning, (3) the onset of which begins before adulthood." *Amicus Curiae Brief of the American Psychiatric Association* in *McCarver v. North Carolina*, No. 00-8727 at 4-5 (U.S. June 8, 2001) (APA Amicus Brief) (citing American Psychological Association, Editorial Board, DEFINITION OF MENTAL RETARDATION IN MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 13 (Jacobson & Mulick eds., 1996); American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992); American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. Text revision 2000). Indeed, in the past, the United States Supreme Court has repeatedly described mental retardation in accordance with the prevailing AAMR and DSM clinical definitions. *See Heller v. Doe*, 509 U.S. 312, 321-22 (1993) (authoritatively citing the APA's DSM-

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In response to *Atkins* and *Williams*, the Louisiana Legislature enacted La.Code Crim. Proc. art. 905.5.1, which prescribes that "no person who is mentally retarded shall be subjected to a sentence of death." It also provides for the procedures by which mental retardation shall be determined. In addition, it provides the following definition of mental retardation:

> 'Mental retardation' means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

La.Code Crim. Proc. art. 905.5.1H(1). The definition is identical to that posited by the AAMR. and endorsed by the Louisiana Supreme Court in *Williams*.

III-R 91987) and the AAMR-9th ed (1992)); *Penry v. Lynaugh*, 492 U.S. 302, 308 n. 1 (1989) (authoritatively quoting the AAMR-8th ed (1983)) definition of mental retardation as "[p]ersons who are mentally retarded are described as having 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'"); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 n.9 (1985) (authoritatively quoting and citing the AAMR-8th ed (1983) definition of mental retardation, as well as the brief of the amicus AAMR—then still the American Association on Mental Deficiency—concerning deficits in adaptive functioning.)

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B. Legal Consequences of the Clinical Definition

In *Atkins*, the United States Supreme Court did not establish a legal definition for mental retardation. Rather, the Court recognized that standardized clinical definitions of mental retardation exist within the mental health profession. *Atkins* specifically referred to the definition published by the American Association of Mental Retardation (hereinafter AAMR), the nation's oldest and largest professional organization in the field of mental retardation, and the adoption of that same definition by the American Psychiatric Association (hereinafter APA). *Id.* at 2245 n. 3.

The 2002 AAMR definition of mental retardation provides:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002). This definition consists of three primary diagnostic criteria: limitations in intellectual functioning, limitations in adaptive behavior, and onset preceding age eighteen. This basic tripartite definition has been adopted by the AAMR, the APA, and the American Psychological Association. It is widely used and accepted among individual practicing professionals and now by the United States and Louisiana Supreme Courts.

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Mental retardation is assessed using well-established, valid and reliable tests and procedures. There are specific instruments that test for each of the three. Valid and reliable I.Q. tests normalized on the general population have been around for some time.

The ninth edition of the AAMR definition, cited by the Supreme Court in *Atkins*, also recognized the uncertainty in I.Q. measurement, defining "significantly subaverage intelligence" as an I.Q. of "**approximately** 70 to 75," taking into account measurement error. *Atkins*, 122 S.Ct. at 2245 n.3.[12] The DSM-IV-TR requires an I.Q. score of "**about** 70 or below," and adds a statement concerning measurement error, and an example of a Wechsler IQ of 70 as representing in actuality a range of 65 to 75. DSM-IV-TR, *supra*, at 41. The DSM-IV also notes that measurement error may vary from instrument to instrument. *See id*

The measurement of an individual's ability to reason is one part of the definition and classification process for professionals who diagnose and treat mentally retarded populations. IQ tests are "far from perfect," as experts acknowledge, but they are still the best current representation the range of intellectual functioning. AAMR, 10th ed., p. 17. In assessing intelligence by application of a standard psychometric instrument, "[t]he criterion for diagnosis is approximately two standard deviations below the mean, considering

12. There is no change in this measurement in the AAMR 10th ed.

the standard error of measurement for the specific assessment instruments used and the instruments' strengths and limitations." AAMR 10th ed., p. 13. The word "approximately" simply means that a number on an IQ test, in and of itself, can neither establish nor defeat a diagnosis of mental retardation. Some individuals with IQ scores in the lowest 2 percentiles of the population will not have corresponding adaptive behavior deficits, and will not be properly diagnosed as mentally retarded. Conversely, some individuals whose IQ is tested at 76 or even higher (approximately two standard deviations below the mean, plus the standard error of measurement) are mentally retarded. When individuals are given two or more IQ tests and the results vary, the diagnosis and classification must focus instead on the person's functional deficits.

C. Mental retardation is not determined by a number

The second criterion for a diagnosis of mental retardation refers to limitations in conceptual, social and practical skills. These are skills that people have learned so that they can function in their everyday lives. Limitations in adaptive behaviors impact a person's daily life and affect the ability to respond to a particular situation or to the environment. The *Atkins* Court recognized the clinical applications of the deficits of mental retardation.

> Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes

> and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.

Atkins, 122 S.Ct. at 2250.

Currently, in the tenth edition of the AAMR, the adaptive behavior skills have been refined as follows:

Conceptual Skills-
- Language
- Reading and writing
- Money concepts
- Self-direction

Social Skills-
- Interpersonal
- Responsibility
- Self-esteem
- Gullibility
- Naiveté
- Follows Rules
- Obeys laws
- Avoids victimizations

Practical Skills-
- Activities of daily living
- Instrumental activities of daily living
- Occupational skills
- Maintains a safe environment

AAMR, 10 ed., at 82.

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D. Mentally retarded persons are complex persons

The AAMR 2002 definition lists five assumptions that are "essential" to the proper application of the definition of mental retardation. AAMR, 10th ed., p. 1. The third assumption is that "[w]ithin an individual, limitations often coexist with strengths."

> This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise who an overall limitation.

AAMR 10th ed., p. 8. This assumption restates one that underpinned the earlier definitions as well. It has an important legal consequence. Simply put, **a diagnosis of mental retardation cannot be defeated by evidence that the individual does something well.**

Similarly, there are a number of federal definitions of mental retardation that are entirely consonant.[13] These

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13. "Mental retardation means significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance." *See. e.g.*. 32 C.F.R. § 57.3 (department of defense regulation);

legislative definitions, and the import of the United States and Louisiana Supreme Court's reliance on similar clinical

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32 C.F.R. § 80.3 (same); 25 C.F.R. § 39.11 (Bureau of Indian Affairs regulation); 34 C.F.R. § 300.7 (Department of Education regulation). Two title 45 (public welfare) regulations add motor functioning deficits to this definition: "Significantly subaverage general cognitive and motor functioning existing concurrently with deficits in adaptive behavior manifested during the developmental period that adversely affect a child's/youth's socialization and learning." 45 C.F.R. § 1355 App. A (foster care data elements); *see also* 45 C.F.R. § 1355 App. B (adoption data elements).

The code of federal regulations also features more specific definitions of mental retardation. In the regulations governing the Head Start program, mental retardation is defined as follows:

> *45 C.F.R. § 1308.10. Eligibility criteria: Mental retardation.*
>
> (a) A child is classified as mentally retarded who exhibits significantly subaverage intellectual functioning and exhibits deficits in adaptive behavior which adversely affect learning. Adaptive behavior refers to age-appropriate coping with the demands of the environment through independent skills in self-care, communication and play.
>
> (b) Measurement of adaptive behavior must reflect objective documentation through the use of an established scale and appropriate behavioral/anecdotal records. An assessment of the child's functioning must also be made in settings outside the classroom.
>
> (c) Valid and reliable instruments appropriate to the age range must be used. If they do not exist for the language and cultural group to which the child belongs, observation and professional judgment are to be used instead.

definitions, compel the conclusion that this Court must rely on the current AAMR definition, and its application by appropriate experts.

III. A Thorough and Competent Evaluation Reveals Kevan Brumfield's Mental Retardation.

A full evaluation of Mr. Brumfield's intellectual functioning was conducted for these proceedings. That evaluation reveals that Mr. Brumfield meets the consensus of criteria set forth by the mental health community for a diagnosis of mental retardation, and La.C.Cr.P. Art. 905.5.1. He exhibits significant limitations in both his intellectual functioning and in his adaptive skills and it is clear that the onset of these limitations was prior to his turning 18 years of age.

A. Significant Limitation in Intellectual Functioning.

Dr. Ricardo Weinstein, a neuropsychologist, and Dr. James Merikangas, a neurologist and psychiatrist, have examined, tested and evaluated, Mr. Brumfield and confirm that he is mentally retarded. Dr. Victoria Swanson has reviewed Mr. Brumfield's school records, mental health records, and various other materials and has determined that he has significant deficits in intellectual ability and adaptive functioning. Their reports, and attached curricula vitae, are attached as appendices.

Dr. Weinstein administered the Stanford-Binet Intelligence Scales, Fifth Edition to Mr. Brumfield. His

scores show a Full Scale IQ of 72, with non-verbal IQ of 69 and a verbal IQ of 77. As will be discussed herein, those scores must be factored with the application of the Flynn Effect, and as such, Mr. Brumfield's true Full Scale IQ score is 69.9; the Standard Error of Measurement is plus or minus five points. As a result of this testing and a review of background materials, including interviews with witnesses, Dr. Weinstein concludes that Mr. Brumfield has mental retardation.

Dr. Weinstein administered the following tests and procedures:

Clinical Interview
Mental Status Examination
Stanford-Binet Intelligence Scales, Fifth Edition (SB-5)
Comprehensive Test of Non Verbal Intelligence (C-TONI)
Test of Memory Malingering (TOMM)
Computerized Assessment of Response Bias (CARB)
Rey 15 Item Test
Rey Complex Figure Drawing
Wide Range Achievement Test, Revision 4 (WRAT4)
Wisconsin Card Sorting Test Computer Version (WCST)
Neuropsychological Assessment Battery (NAB)
- Attention Module
- Language Module
- Memory Module
- Spatial Module
- Executive Functions Module

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Quantitative Electroencephalogram (QEEG)
Adaptive Behavior Assessment System II, (ABAS II)
Reported by: Michelle Brumfield, Sister
Self

As a result of his evaluation, Dr. Weinstein concludes:

> It is my opinion to a reasonable degree of scientific certainty that Mr. Brumfield suffers from mental retardation. This diagnosis is based on the definitions of the State of Louisiana, the AAIDD (formerly AAMR) and the DSM-IV-TR. His IQ is approximately 70 or below, he exhibits concurrent adaptive behavior deficits in practical, social and conceptual skills and these conditions have been present prior to the age of 18.
>
> Mr. Brumfield's mental retardation is the result of genetic, developmental and environmental causes. He was born prematurely with an extremely low weight, his Apgar scores were low. He developed in a very impoverished, dysfunctional and abusive environment with lack of stimulation and support. He exhibited behavioral problems for which he was institutionalized at an early age preventing a proper diagnosis and therefore he never received the necessary supportive services to overcome his cognitive limitations. *Mr. Brumfield has mental retardation.*

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App. I., Neurocognitive Evaluation Report of Dr. Ricardo Weinstein. Dr. Weinstein's Curriculum Vitae is attached to his report.

Dr. Swanson's review of the historical records show that Mr. Brumfield's score on the Stanford Binet is consistent with all prior testing of cognitive abilities. Mr. Brumfield was examined with intellectual assessments six times in the past; twice when he was ten, once at age 13, twice pre-trial, and once recently. As Dr. Swanson explains, the tests administered in school do not show IQ scores. The descriptions used show "low average functioning," and "dull normal." Mr. Brumfield's scores on a Woodcock-Johnson battery, taken while he was 13 years old, show him in the mentally retarded range and functioning 5 to 6 grade levels below his chronological age. The test that was administered pre-trial by Dr. Jordan was an obsolete screening test of little value and revealing no scores. The Wechsler Adult Intelligence Scale - Revised was administered by Dr. Bolter pre-trial showing a Full Scale IQ of 75. When the "Flynn effect" is applied on this test Mr. Brumfield's correct Full Scale score is 70.[14]

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14. The "Flynn effect" is described by the Court of Appeals for Fifth Circuit in *In re: Thomas,* 222 Fed.Appx.222 (CTA5 2007) as follows: "The defendant cites the work of James R. Flynn, Ph.D. which concludes that the rise in general IQ scores of a population are attributable to the use of testing procedures outdated by societal changes and advances. Flynn's theory advocates for the periodic re-normalization of IQ test standard deviations to compensate for inflation and that .3 IQ points is deducted from IQ test scores for every year that has passed since a test was last normed. Applying Flynn's theory to the two previous IQ tests

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Dr. Swanson explains in her report:

I. As noted above, the first intellectual assessment occurred in 1984 through the WISC-R and indicated "low average functioning" with no noted scores.

II. The WISC-R was again administered two months (03/18/84) after the initial academic evaluation by the psychologist at the Margaret Dumas Mental Health Center (MDMHC) and indicated intellectual functioning at the "dull normal" range with borderline functioning noted in verbal reasoning and vocabulary. In contrast to the academic evaluation, this examiner noted no lack of effort; however, there is a high probability that practice effects elevated his scores and overestimated his overall cognitive ability. The norms for the WISC-R were collected from December, 1971 to January, 1973, and were approximately 12 years old at the time of the two WISC-R administrations.

III. Dr. Brian Jordan examined Mr. Brumfield In January, 1995, through the *Quick Test* (QT), a brief intellectual screening test. The QT was designed in 1969 by R. B. Ammons and C.H.

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administered to Thomas would reduce the 75 IQ score by two points, to a full scale score of 73, and would reduce the 77 score to by 10 points, resulting in a full scale score of 67." At 224, fn.8. On this showing, the Fifth Circuit authorized Thomas to file a successor petition for writ of habeas corpus.

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Ammons to assess intelligence based on verbal-perceptual performance and was 34 years old at the time of its administration but the norms used in its standardization were gathered from 1962 to 1969. Dr. Jordan diagnosed Mr. Brumfield with a Sociopathic Personality Disorder, Antisocial Type and noted that the QT indicated he was functioning in the low average range of general intelligence with a mid-elementary academic functioning level. No scores were noted.

IV. Dr. John Bolter examined him in May, 1995, through the *Wechsler Adult Intelligence Scale Revised* (WAIS-R) and noted Borderline Intellectual Functioning with a Verbal IQ (VIQ) of 79, a Performance IQ (PIQ) of 72, and a Full Scale IQ of 75. The WAIS-R was published in 1981 and the norms were collected from 1978 through 1979. The norms were approximately 17 years old when Dr. Bolter administered it in 1995.

V. Dr. Weinstein examined Mr. Brumfield in September, 2007, through the *Stanford-Binet Intelligence Scales, Fifth Edition* (SB-5) and the results indicated mild cognitive deficits with a Full Scale IQ (72) falling between 69 and 77 at the 95% confidence interval. His Nonverbal IQ (NVIQ) was 69 and his Verbal IQ (VIQ) was 77. The SB-5 was standardized in 2000 and the norms were 7 years old when the test was administered to Mr. Brumfield.

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App. 2, Psychological Report of Dr. Victoria Swanson. Dr. Swanson's Curriculum Vitae is attached to her report.

Next, Dr. Swanson explains how those results should be interpreted:

> There are two issues that are relevant in interpreting the results of these intellectual assessments. First, one of these tests, the QT, was a screening measure administered as a component of a larger neuropsychological battery. Screening measures are broad estimates of cognitive ability but should not be considered the equivalent of a full scale administration. Secondly, the Flynn effect must be considered when interpreting the results of these intellectual tests. The Flynn effect is the increase of IQ scores over time as the norms for the standardized intellectual assessment ages. On average, the Full Scale IQ (FSIQ) increases by approximately 0.33 points for every year elapsed since the test was normed or 3 points every decade. The computed Flynn effects for the above four standardized intellectual tests are as follows:

I. The WISC-R norms were 12 years old at the time of the two WISC-R administrations and, therefore, should be interpreted in light of a Flynn Effect of 4 points (12 x .33 = 3.96).

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II. The Ammons QT was at least 34 years old when it was administered in 1995 but its norms were 3 to 7 years older. It is only a screening device but if the results are included in these deliberations, it should be interpreted in light of a Flynn Effect of approximately 12 points (37 x .33 = 12.21).

III. The WAIS-R norms, obtained in 1978, were 17 years old when the WAIS-R was administered to Mr. Brumfield, and the scores must be interpreted in light of a Flynn effect of 6 points (17 x .33 =5.61).

IV. The SB-5 norms obtained in 2000 were 7 years old when the SB-5 was administered, and the scores must be interpreted in light of a Flynn effect of 2 points (7 x .33 = 2.31).

Only Dr. Weinstein adjusted his obtained IQ score for the Flynn effect. The first three examiners did not consider that the scores may have been inflated by the outdated norms of their chosen tests. As no scores were noted in the first three intellectual reports, one cannot compute the true IQ for the two WISC-R and QT administrations.

App. 2.

Dr. Victoria Swanson specializes in mental retardation. See, App. 2, Curriculum Vitae of Dr. Victoria Swanson. She works with schools throughout Louisiana by

providing psychological and behavioral consultations. She has years of experience working with teachers and school administrators in developing educational plans for children with mental retardation. Her report is a reflection of her expertise in determining whether Mr. Brumfield's school and childhood mental health records are consistent with current evaluations. Dr. Swanson also explains in her report that Mr. Brumfield should have been placed in educational programs directly suited for children with mental retardation. She explains:

> Due to mental health and legal issues, Mr. Brumfield attended at least 10 different schools during the six years he was in special education (01/84 - 05/89). His rapid progression through different schools and residential facilities prevented his teachers and pupil appraisal teams from adequately assessing his progress and making referrals for additional evaluation when he did not progress. The Triennial Evaluation disseminated (04/01/87) indicated Mr. Brumfield was only making minimal progress toward meeting his objectives and showed minimal progress on standardized tests. The educational assessment completed at the Reynolds institute (06/07) [sic] and described in more detail below indicated he was functioning five to six grade levels below his chronological age. One year prior to this triennial he was moved into a self-contained Mild/Moderate Generic classroom. In accordance with the Louisiana guidelines

for special education, Mr. Brumfield should have been re-evaluated if he failed to make progress in his classroom performance and standardized scores continued to deteriorate. Mr. Brumfield apparently was placed in a youth detention facility a few months after his Triennial Evaluation and did not return to the East Baton Rouge system until August, 1988. He was again placed in a self-contained, Mild/ Moderate Generic classroom and his reports were all unsatisfactory. Mr. Brumfield did not return for the next academic year and there are no other school reports.

Mr. Brumfield was placed in a self-contained class following the 1983 evaluation. Following three years in a highly structured remedial setting for emotionally disturbed students with average cognitive functioning, he demonstrated only minimal overall improvement. It should be noted that individuals with mental retardation are capable of learning throughout life like anyone else, only learning progresses at a much slower pace and requires interventions adapted to meet their special needs. In a Reevaluation Report disseminated in April, 1987, when he was 14 year, 2 months of age and should have been in the 8th grade, his teacher indicated he was performing at the 4th grade, 0 month level in Reading, Spelling, Handwriting, Oral Language, Social Studies, and Science, and at the 3rd grade, 5th month in Math and the

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3rd grade, 0 month in Written Language. Standardized academic assessment with the *Woodcock Reading Mastery Tests* on 01/15/87 indicated a total reading grade level of 4th grade, 8th month.

Mr. Brumfield's educational exceptionality was Behavior Disorder, and he was initially placed in a regular classroom with one hour of resource (1984). He resided at Independence Home, a residential facility for disturbed youth, (3/25/85 12/05/85) while receiving mental health services from MDMHC. In April, 1985, he moved to a full Behavior Disordered self-contained class at Capital Middle School. He was receiving residential mental health services at Greenwell Springs Hospital at the time of his April, 1986, IEP and that document noted that he was in a Mild/Moderate Generic self-contained classroom for the entire day. The curriculum in a Mild/Moderate self-contained classroom is designed for students who are functioning with mild (55-70) to moderate (40-45) deficits in that subject. Mr. Brumfield received all of his instruction in all subjects at that functional level. All available subsequent school reports indicate he was in a Mild/Moderate Generic self-contained classroom with no time in regular education. A student with a Learning Disabled exceptionality would

> have had some time in regular classes. A student with a Behavior Disorder exceptionality and low-average to average cognitive functioning would have been in a Behavior Disorder self-contained classroom.

App. 2.

Dr. Swanson concludes that all intellectual assessments given to Mr. Brumfield provide evidence that Mr. Brumfield has significant limitations in intellectual functioning prior to the age of 18: "The Flynn-adjusted IQ scores for the WAIS-R (69) and the SB-5 (70) meet the DSM-IV-TR, AAMR 10th Edition, and the La.C.Cr.P. art. 905.5.1(H)(1) intellectual criteria for a diagnosis of Mental Retardation. School and mental health records are consistent with these assessments and indicate these deficits were present prior to the age of 18." App. 2.

Dr. Merikangas, an imminently qualified practitioner of neurology, psychiatry and neuropsychiatry, recently examined Mr. Brumfield, and reviewed historical records, and recent reports. Because "[t]he diagnosis of mental retardation requires a differential approach which eliminates conditions such as autism, mental illness or brain damage," Dr. Merikangas "conducted a neurological physical examination" of Mr. Brumfield. App. 3, Neuropsychiatric Evaluation Report of Dr. James Merikangas, at 2. Dr. Merikangas's Curriculum Vitae is attached to his report.

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Dr. Merikangas reports that "The neurological examination did not disclose any acquired brain damage or ongoing disease." App. 3, at 2.

Similarly, Dr. Weinstein did not find the presence of mental illness when he evaluated Mr. Brumfield.

> Mr. Brumfield was oriented to time, place and person. He was able to answer the simple questions within the standard psychiatric mental examination for mental acuity. His knowledge of current affairs was adequate to his circumstances. He denied visual or auditory hallucinations. There were no indications of psychosis or schizophrenia. He also denied suicidal or homicidal ideation. Mr. Brumfield reflected a range of emotions. He stated that he has a good appetite, sleeps well and does not experience depression. His capacity for psychological insight is very limited.

App. 1.

Based upon Dr. Merikangas's examination and evaluation, he concludes that Mr. Brumfield is mentally retarded:

> It is my medical opinion to a reasonable degree of medical certainty that Kevan Brumfield suffers from mental retardation and that this existed before age 18. This diagnosis is based upon Louisiana Code of Criminal

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Procedure, Article 905.5. 1, by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR), and by the American Association of Mental Retardation (AAMR), Mental Retardation: Definition, Classification, and Systems of Supports 5 (10th Ed. 2002), presently American Association of Intellectual and Developmental Disabilities (AAIDD).

App. 3.

B. Significant Limitation in Adaptive Skills

As has been noted, one of the three components for a diagnosis of mental retardation is "significant limitations ... in ... adaptive behavior as expressed in conceptual, social, and practical adaptive skills." MENTAL RETARDATION: DEFINITIONS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (10th ed. 2002). The DSM-IV-RT states the criteria slightly different: "significant limitations adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., 2000).

Moreover, it has been noted that "[p]eople with mental retardation achieve cognitive milestones at a later age than their normally developing peers, and they are unlikely to ever reach the intellectual level of typical adults." Elaine

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E. Castles, WE'RE PEOPLE FIRST: THE SOCIAL AND EMOTIONAL LIVES OF INDIVIDUALS WITH MEANTAL RETARDATION, 26 (1996). Similarly these cognitive delays directly impact social, emotional and life-skills development. *Id.* at 27-28. "[A]lthough people with mental retardation must cope with many of the same issues faced by their chronological age-mates, they often have limited cognitive and social resources for confronting these normal development tasks." *Id.* at 35-36.

Mr. Brumfield has significant limitation in adaptive skills. As part of his evaluation, Dr. Weinstein interviewed various persons who have known Mr. Brumfield throughout his life, and importantly, as a child. These included family members, a coach, a teacher, and the mother of one of his children. Dr. Weinstein also administered the Adaptive Behavior Assessment System II, (ABAS II), an instrument used to assess an individual's adaptive skills, to Mr. Brumfield's sister and to Mr. Brumfield.

The ABAS II results show a qualitative range of "extremely low" in all categories. App. 1.

Equally important is the results of the interviews with eleven persons who have knowledge of Mr. Brumfield as a child. Through those interviews, Dr. Weinstein was able to assess Mr. Brumfield's conceptual, practical and social skills learned. The examples noted by Dr. Weinstein "are examples of activities and behaviors that his siblings achieved in spite of having been exposed to very similar environments and circumstances."

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Compared to siblings and cohorts he was always delayed.
He was unable to understand simple instruction even during his teen and adult years.
As a child and juvenile he was often unable to understand and follow rules of games and participate with his peers.
He was unable to achieve academically even though he received special services and support.
He had problems controlling his emotions and impulses.
He exhibited poor judgment and even as an adult he was not aware of the consequences of his actions.
He was unable to perform simple tasks requiring visual-spatial coordination including lacing his shoes.
He never learned to perform any tasks or activities that would lead to gainful employment.
He could not follow instructions to the extent that prevented him from obtaining and keeping a job.
Mr. Brumfield never lived independently, rented an apartment, entered into a contract, obtained a driver's license, saved money or opened a checking account.
Mr. Brumfield has always been dependent on other individuals in order to function in society.

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Dr. Swanson confirms that the adaptive skills assessment is consistent with her analysis of the historical records. She states:

> School and mental health records are consistent with these assessments and indicate these deficits were present prior to the age of 18 in at least four of the DM-IV-TR specified adaptive areas (communication, social/interpersonal skills, self-direction, functional academic skills) and the three AAMR 10th Edition adaptive areas of conceptual skills (receptive and expressive language, reading, writing, self-direction), social skills (interpersonal, responsibility, self-esteem, following rules), and practical skills (occupational skills, instrumental activities of daily living).

App. 2.

In conclusion, a thorough investigation was done to locate and interview persons who knew Mr. Brumfield as a child and before he reached 18 in order to determine if the second prong of the diagnostic criteria for mental retardation could be assessed. That assessment reveals conclusively the Mr. Brumfield suffers from significant limitation in adaptive behaviors.

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C. Mr. Brumfield's mental retardation may be attributable to the various risk factors in his life.

While risk factors are not a part of the diagnostic criteria, various risk factors were identified by Dr. Weinstein as a possible explanation for Mr. Brumfield's mental retardation. For examples, mental retardation exists in Mr. Brumfield's family, he had a very low birth weight, and his mother took psychotropic medications during pregnancy. Dr. Weinstein reports the following risk factors:

> Prenatally, Mr. Brumfield's mother was taking psychotropic medication, believed to be Valium, on a daily basis, there was little prenatal care since she was not aware of the pregnancy for approximately 6 months, additionally she was exposed to extreme stress and poverty.
>
> Perinatally, Mr. Brumfield was born prematurely and with a very low weight. He remained in hospital making bonding and stimulation basically non-existent. The Apgar scores reflect significant problems at birth.
>
> During his development he was exposed to extreme stress, physical and emotional abuse. His mother was absent and receiving mental health services. He was not identified early as requiring services, when he attended school it was not until the 5th grade that he

started receiving services although he was misdiagnosed and never received supportive services in order to overcome his cognitive limitations. He grew up in a very dysfunctional and impoverished environment. There were multiple male figures including a stepfather that was an alcoholic that severely abused him. He was hospitalized/institutionalized since he was a child because of behavioral/emotional problems, no proper diagnosis was made and no specific services were provided.

Genetic factors also exist. There is a history of mental retardation in the maternal family. Mr. Brumfield's mother has two siblings that receive SSI benefits for mental retardation.

App. 1.

Mr. Brumfield has conclusively demonstrated that he is mentally retarded. Nothing in this record or the record at trial, casts doubt upon this diagnosis. Under Louisiana's jurisprudence and statute, setting forth the relevant factors and diagnostic criteria, it is abundantly clear that he cannot face execution.

* * *

WHEREFORE, for the foregoing reasons, Mr. Brumfield prays that this Court

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1. Issue the writ of habeas corpus reversing his conviction and sentence of death;

2. Grant him discovery in order to prove these and other constitutional violations;

3. Grant him an evidentiary hearing on the claims set forth; and

4. Grant him all other relief as equity and justice may require.

* * * *

APPENDIX T — MEMORANDUM IN SUPPORT OF OPPOSITION TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS, UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, FILED JANUARY 30, 2008

United States District Court
For the Middle District of Louisiana

KEVAN BRUMFIELD,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent

CIVIL ACTION NO. 04-787-D-MS

(MAGISTRATE NOLAND)

MEMORANDUM IN SUPPORT OF OPPOSITION TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed the instant application for federal habeas corpus relief on November 4, 2004. He presented the following issues to this court for review: (1) the state court erred in failing to grant relief on the *Atkins* claim and erred in refusing to hold an evidentiary hearing on petitioner's claim of mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for

enumerated reasons; (4) juror misconduct and impartiality due to pretrial publicity required reversal of the conviction and sentence; and (5) other listed claims, along with a lack of funding, constituted error.

Following the State's Answer and nearly three years of federal litigation, petitioner sought to amend his habeas application on October 1, 2007. In this pleading styled "Petitioner's First Amended Petition for Writ of Habeas Corpus", petitioner seeks to substantially expand the scope of his original habeas application. First, petitioner seeks to alter the nature of his *Atkins* mental retardation claim by presenting new facts and new arguments to this court that were never raised in the state courts or in his original petition to this court. Second, petitioner seeks to add the claim that lethal injection is cruel and unusual. This claim was only presented to the state courts in a brief, conclusionary manner and was not raised in this court in the original application. Since the claim is an entirely new federal claim, it cannot be said to relate back to his original application filed and answered nearly three years ago.

By this response, the State contends that petitioner cannot and should not be allowed to exploit the legal process in this manner. The State submits that petitioner's amended application for federal habeas corpus relief does not meet the amendment requirements of *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), and the newly-filed "amended petition" presents claims that have not been exhausted in the state court system.

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Additionally, petitioner's state court application for post conviction relief petition raising these claims was more akin to the type of conclusional allegation that the Fifth Circuit has found insufficient to support exhaustion. *Moore v. Quarterman,* 491 F.3d 213 (5th Cir. 2007). Therefore, petitioner's *Atkins* claim and lethal injection claim are procedurally defaulted under 28 U.S.C. § 2254(b)(1)(A).

ARGUMENT

1. The claims raised by petitioner in his " First Amended Petition" do not relate back to his original habeas corpus petition filed nearly three years ago.

In *Mayle v. Felix,* 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005), Justice Ginsburg, writing for the majority, found that a federal habeas corpus petitioner's amended petition did not "relate back" to his original petition because the issue presented in the amended petition failed to arise out of the "conduct, transaction, or occurrence" set forth in the original timely filed application for relief. In that case, the original petition alleged a Sixth Amendment Confrontation Clause violation for allowing the videotaped testimony of a witness into evidence, and the amended petition, which was ultimately disallowed, alleged a Fifth Amendment violation relating to petitioner's own pretrial inculpatory statements to police. An amended application for federal habeas corpus relief, the court held, does not relate back and avoid the one-year time limitation of the AEDPA when it asserted a

new claim for relief supported by facts that differ in both time and type from those of the original petition.

The *Felix* court explained:

> Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See also Advisory Committee's Note on subd. (c) of Habeas Corpus Rule 2, 28 U.S.C., p. 469 ("In the past, petitions have frequently contained mere conclusions of law, unsupported by any facts. [But] it is the relationship of the facts to the claim asserted that is important ... ."); Advisory Committee's Note on Habeas Corpus Rule 4, 28 U.S.C., p. 471 (" '[N]otice' pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted)). Accordingly, the model form available to aid prisoners in filing their habeas petitions instructs in boldface:
>
> "***CAUTION:* You must include in this petition *all* the grounds for relief from the conviction or sentence that you challenge. And you must**

> **state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date."** Petition for Relief From a Conviction or Sentence By a Person in State Custody, Habeas Corpus Rules, Forms App. 28 U.S.C.A. p. 333(Supp.2005) (emphasis in original).

Felix, 545 U.S. at 655-56, 125 S.Ct. at 2570. Furthermore, the court noted that "Rule 15 (c) (2) relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims," and that "[e]ach separate congeries of facts supporting the grounds for relief, the Rule suggests, would delineate an 'occurrence.'" *Felix*, 545 U.S. at 659, 661, 125 S.Ct. at 2572, 2573. It was also pointed out that the court's decision comported with Congress' stated purpose in enacting the AEDPA to advance the finality of criminal convictions. *Felix*, 545 U.S. at 662, 125 S.Ct. at 2573.

In the present matter, petitioner instituted federal habeas proceedings on November 4, 2004. Without a showing of justification, petitioner filed an "amended petition" on October 1, 2007. The time differential alone should be a clear enough indication that the petitioner's "amended claim" is not a true amendment to his previous application. Instead, it should be treated for what it really is, a new and, therefore, successive petition.

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In his original petition, petitioner raised an *Atkins* claim. Most of his argument of this claim was a discussion of *Atkins* itself. Then, petitioner summarized his basis for claiming retardation in this case in four brief paragraphs. Importantly, he mentioned his pre-trial IQ of 75, his alleged fourth grade reading level, as well as various medical records from his childhood that were admitted in the state trial. Most, if not all, of these factual allegations were made during the trial. Thus, they were also part of the record for petitioner's post conviction application before the same state district court. These facts and allegations formed the basis for his state post conviction proceeding and his original application before this court.

Petitioner's first "amended claim" seeks to add many new arguments and facts that were not presented to the state courts or in his original habeas petition to support his *Atkins* claim. Further, petitioner would maintain that these new facts, claims, and legal issues should relate back to his original application, and presumably to his state post conviction proceeding. However, the *Felix* Court admonished that an amended application for federal habeas corpus relief does not relate back and avoid the one-year time limitation of the AEDPA when it asserts a new claim for relief supported by facts that differ in both time and type from those of the original petition.

First, petitioner notes in his "amended petition" that "[a] full evaluation of Mr. Brumfield's intellectual functioning was conducted *for these proceedings.*"[1] Thus,

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1. Petitioner's First Amended Petition for Writ of Habeas Corpus, p. 21. (Emphasis added.)

it is apparent that petitioner seeks to fundamentally alter the facts presented in this court from those presented to the state courts. Petitioner failed to argue functional deficits in state court. Likewise, he failed to raise the issue in his original habeas application. He cannot now "amend" his nearly three-year old petition and add a new factual basis for relief.

Likewise, petitioner argues for the first time in his "amended petition" that this court should consider the Flynn Effect as it relates to his pretrial IQ test score of 75.[2] Prior to this alleged "amended petition", petitioner has never mentioned, let alone presented to the state courts, any issue related to the Flynn Effect.

Further, petitioner seeks to introduce the evaluations of Dr. Weinstein and Dr. Swanson who have evaluated petitioner since the institution of habeas proceedings in 2004. Apparently, these experts conducted new evaluations and considered new evidence that was not presented in state proceedings as a basis for claiming retardation now. As an example, Dr. Weinstein allegedly conducted the Adaptive Behavior Assessment System II test and interviewed eleven people who had knowledge of Brumfield's childhood.[3] Obviously, none of this evidence was presented in any of petitioner's state proceedings, and their introduction at this stage of the proceedings

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2. Petitioner's First Amended Petition for Writ of Habeas Corpus, p. 22.

3. Petitioner's First Amended Petition for Writ of Habeas Corpus, p. 30.

fundamentally differs in both time and type from those of the original petition.

Further, for the first time in his "amended petition" petitioner claims that he has certain risk factors that are not part of any diagnostic criteria that might explain his alleged mental retardation.[4] Again, this has not been previously argued, and it fundamentally alters the nature and type of claim originally presented in his applications for state post conviction and federal habeas corpus.

Petitioner's second "amended claim" is even farther removed in time and type from those presented in his original habeas petition. In his original petition, petitioner filed a thirty-nine-page application. There was only one mention of lethal injection. In the final portion of his application, petitioner asserts:

OTHER CLAIMS AN D [sic] ISSUES

Brumfield raised a variety [of] other claims including:

* * * * *

> 11. Death by lethal injection as prescribed [sic] under Louisiana law is cruel and unusual.

Although petitioner claimed a lack of funding prevented him from pursuing and/or presenting these

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4. Petitioner's First Amended Petition for Writ of Habeas Corpus, pp. 31-32.

claims previously, he provided no support for such an allegation, especially as it related to the lethal injection claim.

Despite any lack of specificity, argument, or legal support for this claim in his original petition, the "amended petition" consists of twenty-four pages of new arguments and legal analysis. Surely, these claims are different in time and type from the single line reference in the original petition and the state post conviction proceedings.

Petitioner has filed an expanded "amended petition", which sets forth new facts and issues that are procedurally barred. In *Felix*, the petitioner incorrectly argued that his expanded amended petition related back to the date of the original filing "because both the original petition and the amended pleading arose from the same trial and conviction." *Felix*, 545 U.S. at 649-50, 125 S.Ct. at 2566. The United States Supreme Court rejected this argument. Similarly, petitioner herein has amended his complaint to include issues and facts not properly before this court. Petitioner cites no legal authority to support such an amendment. These new allegations and facts presented in petitioner's "amended complaint" should not be considered on the merits as these claims are properly time-barred and do not relate back to the date of the filing of the original petition. The present case for applying the one-year time limitation procedural bar to petitioner's new claims is even more compelling than the case presented in *Felix*. For these reasons, the state submits petitioner's new and expanded "amended claims" should be time-barred.

2. The claims raised by petitioner in his "First Amended Petition" have not been properly exhausted in state court, because petitioner seeks to greatly expand both the claim he presented to the state courts as well as the factual and evidentiary evidence in support of his claims.

Additionally, the state submits petitioner's amended application for federal habeas corpus relief presents factual issues not exhausted in the state court system, and thus they should be procedurally barred on federal review now. Petitioner's new amended petition presents factually different allegations from those presented previously in state courts. Specifically, in the amended petition, petitioner greatly expands the nature of his *Atkins* claim by arguing new facts and new legal theories that were not presented in state court. Likewise, in the amended petition, petitioner argues in one paragraph that the three-drug method of lethal injection is unconstitutional,[5] while in state court he argued that the procedure for lethal injection was "impermissibly vague and impermissibly allow undue discretion to the director[.]"[6] These allegations have not previously been made in the original petition for federal habeas corpus relief; these allegations were not made at any point during petitioner's post-conviction proceedings in state courts; these allegations were not made at any point during petitioner's direct appeal proceedings in state courts.

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5. Petitioner's First Amended Petition for Writ of Habeas Corpus, p. 34.

6. Petition for Post-Conviction Relief, p. 18.

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The doctrine of exhaustion permits "the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary *(Vasquez v. Hillery,* 474 U.S. 254, 257, 106 S.Ct. 617, 88.L.Ed.2d 598 (1986)), and its purpose is grounded in concerns for federal and state comity. It is established that "[s]tate courts should have the first opportunity to make right their mistakes." *Deters v. Collins,* 985 F.2d 789, 794 (5th Cir. 1993). The exhaustion doctrine is codified in 28 U.S.C. 2254 (b) (1).

In *Moore,* the Fifth Circuit noted that the exhaustion requirement is satisfied if petitioner has fairly "presented the substance of his claim to the state courts." Citing *Vasquez v. Hillery,* 474 U.S. 254, 258, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). The exhaustion requirement is not satisfied if a petitioner "presents new legal theories or factual claims in his federal habeas petition. We have consistently held that a petitioner fails to exhaust state remedies when he presents material additional evidentiary support to the federal court that was not presented to the state court." Citing *Anderson v. Johnson,* 338 F.3d 382, 386 (5th Cir. 2003). Evidence is not material for exhaustion purposes if it "*supplements,* but does not *fundamentally alter,* the claim presented to the state courts." *Id.* at 386-87. The failure to exhaust is a procedural bar to federal review that may be excused if the petitioner "can demonstrate cause for the defaults and actual prejudice." Citing *Martinez v. Johnson,* 255 F.3d 229, 239 (5th Cir. 2001) [Emphasis in original].

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In *Moore,* the Fifth Circuit noted that the state correctly argued that Moore's successive state habeas petition was sparse to the point of amounting to a brief, conclusional allegation of mental retardation. The state emphasized in particular that Moore made no allegations and offered no evidence before the Texas courts with regard to his limitations in adaptive skill areas. The state contended and the Fifth Circuit agreed that the presentation of such allegations and evidence for the first time in federal court fundamentally altered petitioner's *Atkins* claim, rendering it unexhausted.

The *Moore* court again referred to *Anderson,* which it called an "admittedly close case" on whether the petitioner had exhausted his state court remedies with respect to his ineffective assistance of counsel claim. In *Anderson,* the Fifth Circuit asserted that the fact that "the portion of Anderson's state post-conviction brief dedicated to ineffective assistance is remarkably detailed in both fact and law" which provided the tipping point in favor of a finding of exhaustion. *Anderson,* 338 F.3d at 388.

Likewise, in *Morris v. Dretke,* 413 F.3d 484 (5th Cir. 2005), an even more recent "admittedly close" case in which the Fifth Circuit addressed the question of whether new evidence introduced in federal court rendered petitioner's *Atkins* claim unexhausted, the Court similarly emphasized the importance of the detail with which the state petition was presented. *Morris,* 413 F.3d at 496.

However, the claim in question in the *Moore* case "pales in comparison to the one we considered in *Morris.*"

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Moore merely asserted in his petition that he had scored a 74 on an IQ test when he was a child, that he had been placed in special education throughout his schooling, and that he had suffered multiple head injuries, one of which occurred when he was no older than ten. Moore cited to the trial record in support of these claims but offered neither school records nor supporting affidavits from family members, friends, teachers, or even the psychologist who had testified on his behalf at trial. He referenced neither the AAMR's diagnostic criteria for mental retardation nor the similar definition of retardation contained in § 591.003 of the Texas Health and Safety Code. Most importantly, he failed to allege that he is deficient in two or more adaptive skill areas and indeed made no mention of adaptive limitations as such. Moore's contention that he was in special education throughout his schooling arguably could be construed as an allegation that he was only minimally functional in an academic setting. In support of that bare assertion, however, he did not "identify any specific special education classes or provide documentation of those classes," *See Moreno v. Dretke,* 450 F.3d 158, 164 (5th Cir.2006), nor did he offer any reason why he could not present such evidence. Moore's petition did not touch, even arguably, on any other adaptive skill area, let alone explain why supporting evidence was lacking. Such a petition cannot be considered sufficiently "detailed in fact and law" to warrant a finding of exhaustion.

In *Moreno,* the Fifth Circuit considered an *Atkins* claim of mental retardation, where the claimant presented evidence in state court that he scored a 64 on an IQ test that was administered when he was 35 years of age. The

psychologist who administered this test qualified the score by observing that the results probably reflect the lowest level of his abilities, the results may not be valid, because he may not have been motivated to give his best effort on some of the tasks, and may have exaggerated any possible deficits. The psychologist also observed that Moreno's speech was "free of articulation errors," he expressed himself appropriately and coherently, and his "cognitive processing speed was unremarkable." He was oriented to time and place, his memory was intact, and he was able to perform tasks that took several minutes of concentration. Although Moreno argued that he suffered adaptive limitations by alleging his attendance at special education classes as a child, his only evidentiary support in state court for that claim was the psychologist's report reciting Moreno's self-reported educational background. He could not identify any specific special education classes or provide documentation of those classes. Moreno also argued that his history of substance abuse indicated adaptive limitations. The state court dismissed this claim brought in a successive state habeas corpus petition as an abuse of the writ because Moreno had not alleged sufficient facts to establish a prima facie case supporting his claim. Specifically, the court held that Moreno had not alleged sufficient facts to support a finding that he suffered adaptive limitations. Based on this set of facts, the Fifth Circuit declined to grant a Certificate of Appealability on the *Atkins* claim.

As in the cited cases, petitioner's first "amended claim" seeks to add many new arguments and facts that were not presented to the state courts or in his original

habeas petition to support his *Atkins* claim. In his state post conviction application, petitioner referenced only the facts presented at trial and discussed previously herein, namely his pre-trial IQ score of 75, his alleged fourth grade reading level, as well as various medical records from his childhood that were admitted in the state trial.[7] All of the "new" evidence and arguments that were presented in his "amended petition" court fundamentally altered petitioner's *Atkins* claim, rendering them unexhausted.

In *Moore*, *Morris*, and *Anderson*, the Fifth Circuit repeatedly emphasized the importance of the detail with which the state petition was presented when considering whether or not a claim was properly exhausted. In the instant case, it is readily apparent that petitioner did not exhausted this "amended claim" in state court. Since these facts and claims were not fairly presented in state court, petitioner cannot raise them in this federal forum. The factual support offered in the state court in this case is very akin to that presented in *Moore*, and, like in *Moore*, this court should rule the new claims and factual support are unexhausted.

As to petitioner's second "amended claim", i.e., lethal injection, it is likewise readily apparent that his claim was not exhausted in state court. In his state post conviction application, petitioner allotted one paragraph to this claim. It reads as follows:

---

7. Petitioner's First Amended Petition for Post-Conviction Relief, pp. 9-10.

(o) Death by lethal injection as prescribed [sic] under Louisiana law is cruel, unusual, authorizes unconstitutional torture, and violates due process. Among other things, Louisiana's statutory provisions for death by lethal injection (see especially La. R.S. 15:568-569) are impermissibly vague and impermissibly allow undue discretion to the director of the Department of Corrections as to the quantity, type, and injection method of the substance or substances to be injected -- with no statutory requirement that any such injection be without pain or

* * * *

APPENDIX U — PLAINTIFF'S EXHIBIT 26, SOCIAL HISTORY, THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, ENTERED INTO EVIDENCE JULY 16, 2010

KEVAN TREMELL BRUMFIELD

SOCIAL HISTORY

(6/29/95 revision)

INTRODUCTION

The following information has been collected and analyzed for the purposes of providing an extensive social history on Kevan Tremell Brumfield to the East Baton Rouge Parish Office of the Public Defender. Mr. Brumfield is currently incarcerated at the East Baton Rouge Parish Prison. He has been charged with the First Degree Murder of a police officer on January 7, 1993.

The social history information is arranged in the order of chronological information obtained describing Mr. Brumfield's development (family, parents, school, etc), followed by a summary of the key points in his development. Next, the primary factors influencing the development of Mr. Brumfield will be identified and analyzed from a criminological perspective. Finally, a concluding summary will be provided to succinctly describe how the specific combination of factors influencing Mr. Brumfield's development have led to his current involvement with the criminal justice system.

Appendix U

Birth to Age 5 (1973 to 1978)

Kevan was born on January 7, 1973, at Earl K. Long Hospital in Baton Rouge. According to his mother, Mrs. Vella Brumfield, Kevan was born premature and was taken to Our Lady of the Lake Hospital for specialized treatment. Kevan weighed 3 1/2 pounds at birth, according to family sources and official records. Kevan was only in Earl K. Long Hospital for one day. His length of stay in Our Lady of the Lake Hospital is unknown because records cannot be located. Ms. Brumfield indicated that he remained in the hospital one or two months, but official records from the mental health center report a two to three week length of stay.

When asked if there was any particular problem with the pregnancy, Mrs. Brumfield stated that her common-law husband's great grandmother died shortly before Kevan was born and she felt that the stress of the family death was related to the early birth. She reported that Kevan's birth was normal in every other way. She denied using drugs or alcohol during the pregnancy. When Kevan was allowed to come home after his birth, his weight had increased to about 5 pounds.

Another notable point about Kevan's birth is that his certificate states that his father is William Brumfield, Jr. Kevan's natural father is actually Thurman C. Ellis. When asked about the discrepancy, Mrs. Brumfield stated that she was still married to William Brumfield when she gave birth to Kevan, so the hospital required that she use her married name.

Appendix U

During the early part of his life, Kevan spent time with his paternal great grandmother, Beulah Stone, who is currently age 94 and living in Baton Rouge. She no longer is able to maintain a relationship with Kevan and Teodis, Kevan's older brother, because of her affliction with Alzheimer's Disease. Mrs. Stone lived with her daughter, Mamie Ellis, until Mrs. Ellis' death in 1991. Kevan also visited with his maternal grandmother, Mamie Ellis, frequently.

During his first few years, Kevan also spent time in Mississippi with his maternal grandmother and cousins. His maternal grandmother, Brunette Pittman, died in 1988 or 1989. Mrs. Pittman lived in Columbia, Mississippi. Kevan reports that the time spent with his cousins was fun. Evidently, Mrs. Pittman maintained a large vegetable garden. The young boys worked in the garden and sold the produce for money. Kevan reported that he was good selling the fresh vegetables and participating in other summer activities.

Kevan reported that he attended church while in Mississippi, as well as in Baton Rouge, during the early years of his life.

The only notable behavioral incident that occurred during the early childhood years, of which I have been informed, involved a fire when Kevan was 3 or 4 years of age. Evidently, Teodis and Kevan were in bed late one night, playing with a candle, and caught the bed on fire. Kevan said it was his fault. He was whipped with a belt and made to sit in a chair in the hall all night. When asked if he

remembered what he did in the chair all night, at the age of 3 or 4, he said he slept some, but had bad nightmares. He also was cold. The incident is mentioned in the current report because it was evidently memorable enough to be reported to me by Kevan and his mother in independent interviews. Additionally, there is some mention of the incident in official records from other agencies.

This was an isolated incidence of "fire setting" behavior and only has any significance in terms of the methods for dealing with behavioral problems in Kevan's home and the memory that it left upon family members. There is no indication that the fire setting behavior occurred again.

During the early childhood time frame, there were three "fathers" in the home. Mr. Ellis was present from 1973 to 1974. Mr. Ross was present from 1974 to 1977. Mr. Barry White was present somewhere between 1978 to 1980. There was another "friend," Joseph Moore, who visited on the weekends or in the home inconsistently during the late 1970's.

Maternal History

Vella Lanier Pittman was born on August 24, 1951 in Tylertown, Mississippi. Her ethnic background is Creole, Portuguese, Caucasian and Native American. Her family moved to Sandy Hook, Mississippi, when she was very young. Sandy Hook is between Columbia, Miss. and Bogalusa, La. Mrs. Brumfield had a good relationship with her maternal grandparents. She reported that her grandfather was a longshoreman for the Port of New Orleans and that he spoke 18-21 different languages.

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Mrs. Brumfield reported that her childhood was not happy as her mother and common-law stepfather did not get along well. She reported that there was domestic abuse in her home as she grew up. She met William Brumfield when she was 16 and married him when she was 17 years of age. She did not remain with Mr. Brumfield long; approximately two years from 1968 to 1970.

Mrs. Brumfield moved to Baton Rouge and began attending Spencer's College, where she met Thurman Ellis.

Approximately one year after she met Mr. Ellis, Teodis was born. Kevan was born slightly over one year later (1973). Mrs. Brumfield was 19 when Teodis was born and 21 when Kevan was born.

After Mrs. Brumfield and Mr. Ellis terminated their relationship, Raymond Ross lived with her in another common-law relationship. This union lasted from 1974 to 1977. Two children, Michelle and James were products of the Brumfield-Ellis common law union.

When Mr. Ross left, Barry white moved into the house. According to Mrs. Brumfield, Mr. White was not abusive. The children do not really seem to remember Mr. White, but he is listed as a stepfather in at least one official record. Mr. Joseph Moore was another male friend who was in and out of the home during the time frame of 1977-78, when Kevan was between 4 and 5 years of age. Kevan and his father remember Mr. Moore's presence in the home. Mr. Moore must have been an acceptable type person as

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Kevan and his father independently reported that he was an "ok" person. Kevan reported that Mr. Moore "drank, but he didn't hit." Mr. Ellis also stated that he "saw him around" and he was "ok."

From approximately 1979 to 1980, another man, James Simms, visited with Mrs. Brumfield and the family. Mrs. Brumfield reported that James Simms was only a friend and remained in the home to help her. Teodis did not remember Mr. Simms but Kevan did.

From 1980-89, McDonald Metevia, lived with Mrs. Brumfield and her children. This would place Kevan in the age span of 7 to 16 years of age. This common law relationship produced Donna, age 11; Latoya, age 9 and Monchez, age 7.

Mrs. Brumfield has worked off and on the majority of her adult life. She completed Spencer's College in the field of Business Administration. She has also taken accounting, typing and business math at American College. She has participated in work program for welfare mothers. Mrs. Brumfield has also worked in various capacities for Burger King for approximately 16 years. During much of her relationship with McDonald, Mrs. Brumfield reported that she worked at Burger King from 11:00 a.m. to 5:00 p.m., while also working at a local convenience store from 2:00 a.m. to 6:00 a.m. During this time, she was also enrolled in classes at the American College. According to Mrs. Brumfield and the children, she was not home much.

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Mrs. Brumfield reports that she does not drink or smoke and never has. She has relied on valium in the past for her "nerves," but the use of the drug was inconsistent. Mrs. Brumfield also reports that neither she nor anyone else in her family history, had any type of criminal record or substance abuse problem.

Paternal History

Thurman C. Ellis, Jr. was born on July 27, 1946. He is currently 48 years of age. He is Kevan's natural father. Mr. Ellis was born in Baton Rouge and attended public school in East Baton Rouge Parish. He attended Capitol High School and played basketball, football and baseball. He expressed some regret in not finishing the 12th grade. Mr. Ellis evidently made good grades, but had an opportunity in the 12th grade to play basketball with the "Road Kings," the "feeder" group to the Harlem Globetrotters. Mr. Ellis traveled internationally for about 1 1/2 years with the Road Kings. He was drafted in 1968 and served in Germany. Mr. Ellis' only brother was killed in an accident on a military base in the United States. As a result he was not sent to active duty, *i.e.* Vietnam, because he was the only son remaining in his family.

Mr. Ellis reported that he left Mrs. Brumfield in 1974 because they did not get along. He says that he generally lived 4-5 blocks from Teodis and Kevan, especially in their early childhood years. He also reported that his family spent a great deal of time with Teodis and Kevan, at their early ages. Mr. Ellis stated that he always tried to keep up with child support payments. He acknowledged

that he did fall behind during the years when he became unemployed. He was legally sanctioned in the mid 1980's for non-support.

Mr. Ellis has been involved in his current relationship with Catherine Johnson since 1976. They have four children - David, age 17; Jermain, age 15; Tabitha, age 14 and Erica, age 12. Ms. Johnson also has a daughter, Chandra, age 25, from another common-law relationship. The four Ellis-Jackson children live with Mr. Ellis and Ms. Johnson. Chandra lives in Amite.

Mr. Ellis reports that he generally has no trouble finding work. He is a laborer, particularly in the field of carpentry. He stated that he generally works with contractors at the plants. Mr. Ellis was also employed as a correctional officer at Feliciana Correctional Hospital for approximately 5 years.

Mr. Ellis maintained a good relationship with his mother throughout her life. Mamie Ellis was a personal domestic employee to Bishop Ott, a well known Catholic Bishop in Baton Rouge who died several years ago. Mrs. Ellis worked for him for approximately 20 years. Mr. Ellis reported that the Bishop conducted his mother's funeral in 1991.

Mrs. Ellis' mother, Beulah Stone, is in a nursing home now and has developed Alzheimer's disease during recent years.

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Mr. Ellis' father is Wilson Ellis. Wilson Ellis maintained little contact with Thurman Ellis as he grew up. Wilson Ellis lived in California a great deal of his life and has recently moved back to Baton Rouge. Wilson Ellis has not been a part of the Ellis family.

Mr. Ellis reports that he continued playing baseball until three or four years ago. He has been active in Little League teams.

Mr. Ellis was raised in the Star Bethlehem Church, but doesn't attend church consistently at this time.

When asked about any criminal history, Thurman Ellis cited several earlier incidences of law enforcement arrests, including one or two DWI's in the 1970's. Mr. Ellis reported that he was "wild" when he returned from the service and wasn't really thinking. He felt that his trouble with the law was alcohol related or "acting wild" when he was younger. He was on probation for some of his legal situations at one point in time. Mr. Ellis said that he had several misdemeanor charges in his earlier years, but had not experienced any legal problems since the mid 1980's.

Upon further questioning, Mr. Ellis denied that there was an alcohol problem and that he did not receive a DWI when he was living with Teodis and Kevan. He stated that he drinks on occasion now, but it is no more than "a beer or two."

He did not know of any other criminological problems in the family. He thought that Mrs. Ellis may have had

a brother who was in jail at one point in his life, but Mr. Ellis did not know any of the details.

Family Related Information

Both parents were asked about their perceptions of Kevan's early life. Mrs. Brumfield described Kevan's early years at home as normal. Kevan's father, Thurman Ellis, remained in the home until Kevan was slightly older than one year of age. Mr. Ellis and Mrs. Brumfield maintained a common-law type of relationship from approximately 1970 to 1974. From this common law union, two Brumfield-Ellis children were born. The family primarily remained in the north Baton Rouge area, with Mr. Ellis and his extended family within several miles of the Brumfield home.

Kevan is the second child of the Brumfield-Ellis common-law union. Teodis is his only full sibling. He has five maternal half siblings and four paternal half siblings. He maintains a relationship with each of the half-siblings; although he doesn't know the younger children very well. All seven of Vella Brumfield's children have the last name of Brumfield, even though William Brumfield was not the father of any of the children. Kevan and his older brother, Teodis, were the only children from the Brumfield-Ellis common law relationship. Teodis is the oldest Brumfield child and is approximately one year older than Kevan.

When each of Kevan's parents were asked the reason they split up, Mrs. Brumfield expressed her belief that Mr. Ellis "ran the streets" too much when they were living together. She also was concerned about his motivation for

employment. Mr. Ellis was less specific in his comments. He felt that they just had too many differences. He expressed his concern that Mrs. Brumfield may have turned the children against him over the years. He also was concerned about her welfare dependency.

Although Mrs. Brumfield and Mr. Ellis still indicate that they have unresolved feelings about their relationship and parental roles and responsibilities, both suggested to me a relatively normal birth and upbringing of Kevan during the first 5 or 6 years of Kevan's life. Mr. Ellis did not remember much about Kevan's prematurity. Mrs. Brumfield reported that she was more being "protective" with her first two children. She also stated that the children were angry with her when Mr. Ellis left, because they felt that it was her fault.

The second "father" figure in the Brumfield home was Raymond Ross who is deceased. He maintained a common law relationship with Mrs. Brumfield from 1975 to 1978. During this time frame, Kevan was 2 to 5 years of age. Of the Brumfield-Ross common-law union, Michelle, age 20 and James, age 17, were born. It was reported to me by Kevan, Mr. Ellis and Mrs. Brumfield that Mr. Ross died from a stab wound to his forehead when Michelle was very young. From informal reports, Mr. Ross may have had at least one arrest in his history, but there was not much information provided about this "second father."

The third "father" in the Brumfield home was Barry White. Not much is known about Mr. White. Sometime during Mr. White's tenure, Mr. Joseph Moore entered the

family constellation. Not much is known about him, other than the information that was given to me by Kevan and Mr. Ellis, indicating that he was "ok." Mr. Ellis believes that he is still alive and living in Baton Rouge.

The last two "father figures" in Kevan's life are discussed in the next section of the report.

Age 6 to 11 years (1979 to 1985)

The Brumfield children moved to Mississippi in 1979 and lived with their maternal grandmother. Mrs. Brumfield went to California. Kevan began the first grade at Primary Elementary School in Columbia, Mississippi. It is probable that he also attended the second grade in Mississippi, but no one interviewed can remember where Kevan attended the second grade. Neither East Baton Rouge nor Marion County School Boards can locate Kevan's early school records. Kevan reports that he performed very well in school there (Records have been requested, but not received). He moved back to Baton Rouge and attended Park Forest Elementary School for the third, fourth and part of the fifth grade. Kevan began experiencing behavioral problems in school in the third grade, in 1981. Although the records are a little unclear as to which problems occurred during specific grades, it appears that Kevan began experiencing serious problems remaining in his seat, or wherever he was supposed to be. Upon being corrected by the teacher, he would behave in a defiant or oppositional manner. His first suspension from school occurred at Park Forest when he became upset and/or angry and "knocked" the physical education teacher down. He was suspended for 30 days.

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Kevan's third grade teacher recommended that he be evaluated for placement in a behavior disordered class. Although this recommendation took place at the end of the third grade, he was not evaluated until the fifth grade. Kevan's third and fourth grade teachers (Mrs. Arceneaux and Mrs. Cross) were committed to working with him. In the first half of the fifth grade, Mrs. Arceneaux was his teacher again and she was very surprised to find that he had not been evaluated. Mrs. Arceneaux felt that he had "fallen through the cracks." The records and personal communication from the teachers reflect that the school worked closely with Kevan and his mother until he could be evaluated by the school evaluation team. From discussions with his teachers, it was evident that Kevan responded best to one on one situations or small groups. He evidently lost control of himself in large and/or disorganized groups. Recess was a particularly difficult time for him.

Kevan was initially referred to Margaret Dumas Mental Health Center in February 1983 at the age of 10 years. The referral was from the school system. He attended several counseling sessions and was evaluated by a staff psychiatrist. He was placed on Mellaril, an anti-psychotic drug, for a short period of time. On May 24, 1983, he was diagnosed as "Adjustment Disorder with Mixed Emotional Features" (DSM II, 309.28). He was also referred to the East Baton Rouge Parish School Board Pupil Appraisal Services during the same year in order to have an individual evaluation conducted. Based upon the results of that evaluation, Kevan was referred for special education services because of his classification as a "Behavior Disordered Student" (BD). The particular impairment

that was identified as "inappropriate types of behavior under normal circumstances." The BD classification, with the defined impairment, set the parameters for his "treatment" in the special education curriculum (State Bulletin 1508, State Bulletin Handbook). According to the Handbook, the definition of a Behavior Disordered child is:

> A behavior disorder is a pattern of situationally inappropriate interpersonal or intrapersonal behavior which is exhibited over an extended period of time and to a significant degree, and which cannot be explained by intellectual, sensory, neurological or other general factors. One or more of the following behavior patterns shall be exhibited:
>
> A. Inappropriate types of behavior or feelings under normal circumstances;
>
> B. A general pervasive mood of unhappiness, depression or withdrawal; or
>
> C. A tendency to develop physical symptoms or fear associated with personal or school problems.

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> The term never included students who are autistic: it may include students who are socially maladjusted if it is determined that they are also behavior disordered.
>
> (State Bulletin 1208, 1985)

Kevan transferred to Harding Elementary during mid-semester of the fifth grade in January 1984. The change in school settings was significant in that he lost the support of the two teachers and the principal, who seemed to understand that something was the matter with him. Kevan was placed in the self contained class for Behavior Disordered children, based upon his Individual Evaluation Plan. His teachers seemed to feel that he improved for a certain period of time He was referred back to Margaret Dumas Mental Health Center in February 1984. The specific reason for re-referral was stated as "Intellectual functioning. Question learning disability. Are emotional problems causing lack of self control?" Kevan took a battery of tests and the psychiatric impression was stated as "Although alternative formulations may emerge from additional investigation, results of the examination suggest a learning disability related to slowness in perceptual motor development."

One of his special education teachers, Mr. Throne Allen, indicated that Kevan was the best behaved student in the small BD class that he taught. The BD classes often contained a maximum of six students and were much more structured than the regular classes.

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Kevan was also tested periodically by the East Baton Rouge Parish School Board Pupil Appraisal Services. In addition to the results of individualized tests and the evaluation of progress made in interventions, it was revealed that Kevan functioned in a low average intellectual range, with below grade level performance. It was suggested that Kevan's behavior was so inconsistent, he could actually be brighter than appeared on the test. It should be noted that the scores split, with Kevan functioning well in some areas and very poorly in other areas. The scores were not consistent in terms of his ability to perform, *i.e.* good ability to recognize words, but poor ability to understand their meaning.

Kevan was transferred to Glen Oaks Middle School in 1984, then Capitol Middle School for the 6th grade in 1984-1985. His behavior problems continued and he remained in the special education classes for BD children. He was suspended from Glen Oaks Middle School in March of 1984 for threatening a student. Kevan was referred back to the mental health center again. He continued in Glen Oaks Middle School through the end of the year, then began middle school at Capitol Middle School.

During the elementary school time frame, Kevan's home situation was equally, if not more chaotic. As Kevan entered the second or third grade, the fourth father figure emerged and remained with the Brumfield family through approximately 1989. McDonald Metevia established a common-law union with Mrs. Brumfield and produced three additional children. Teodis, Kevan and Michelle independently describe Mr. McDonald as an alcoholic,

abusive Vietnam veteran who brutalized Teodis and Kevan. He did not hurt Michelle, except on rare occasions. James was very young and Mr. Metevia did not abuse his own children. In independent reports, Teodis, Kevan and Michelle have described similar incidents in the home.

Upon questioning, Mrs. Brumfield reported that she was out of the home a great deal and was aware of at least one of Mr. Metevia's "methods" of punishing Teodis and Kevan. She did not necessarily feel that his methods hurt the children. Mr. Ellis initially reported that he was completely unaware of the abuse, except in the use of one particular method. During later interviewing sessions, he appeared to know more than he originally said he knew. His common-law wife, Catherine Johnson seemed to be completely aware of the conditions in the Brumfield home and stated that she and Thurman Ellis had attempted to get the children placed into their home on numerous occasions. The children identified neighbors, friends and other relatives who reportedly can verify the type of environment in which the children lived during the 9 years that Mr. Metevia was present. Teodis and Michelle did not report the problems outside of the home. Upon being questioned about that, they did not seem to know why no one helped them. Teodis described a particular event where the physical abuse of Kevan was so extreme that Kevan experienced some type of "seizure." After that, Teodis asked his father to come get him so he could live with them. Mr. Ellis picked up Teodis and he moved in with the Ellis family. Michelle's grandmother moved her to Bridge city prior to Michelle's senior year.

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Kevan reported that he reported the problems to the child abuse agency and could not understand why they did not intervene. Mrs. Brumfield remembers being investigated by the neglect and abuse agency, but reports that she denied the charges and told them that Kevan was being manipulative.

The outcome of the situation with Mr. McDonald became apparent through the further examination of records. Kevan basically spent from 1985 to 1988 in and out of institutions and group homes. Michelle was picked up by her paternal grandparents and moved to Bridge City. Teodis moved out of his mother's home into his father's home until he felt that he was big enough to defend himself. Mrs. Brumfield reports that there are some problems with the other Brumfield children, but most of them were much younger when McDonald left. James Brumfield, age 17, has been placed in special education at Istrouma. McQuez Brumfield, age 8, is showing signs of academic problems.

Kevan, at the age of 12, was referred for his first out of home placement to Independence Home, a group home of youth. He remained in the facility from March 1985 to December 1985. The facility no longer exists, but was owned by the Volunteers of America. It is now a different facility.

<u>Age 12 - 16 1985/86 to 1988/89</u>

Kevan's stay at Independence Home was characterized by inconsistent behavioral progress. Records indicate he could behave for a short period of time, but would become

aggressive when interacting with other children. He engaged in fights, misbehaved at school and experienced numerous authority problems. Kevan was demanding to the staff. Alternatively, Kevan developed a close relationship with a male volunteer at Independence Home. Kevan evidently shared information with Mr. Dorsey about the physical abuse in the home.

While living at Independence Home during the summer prior to the 7th grade, Kevan was placed on a trial medication of Mellaril and Artane by the Margaret Dumas Mental Health Center. Mellaril is the same anti-psychotic drug that was given to him earlier by the Center. Artane is reportedly a type of antihistamine similar to Benadryl, indicating that it has a "calming' effect. The effect of the drugs on Kevan were problematic. In October of 1985, Dr. Gammel, from the mental health center, established a ranking system through which Kevan's behavior could be evaluated during various stages of medication and non-medication. His behavior was best when he was not on mellaril and worst when he was on mellaril alone. his behavior seemed to be better across the board when he took combined doses of mellaril and artane. While on Mellaril and Artane, his behavior was ranked poor 22% of the time. While on mellaril alone, his behavior was ranked poor 56% of the time.

Daily progress notes from Independence Home suggest that Kevan's behavior was linked to his mother's response to him. When his mother was not responsive to phone calls or did not pick him up when she was supposed to, his behavior became even more problematic.

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Kevan entered the 7th grade at Valley Park Middle School, while still in the care of Independence Home. He was eventually re-evaluated at the mental health center and was diagnosed as "Conduct Disorder, Undersocialized, Aggressive 312.00."

Kevan's discharge summary from Independence Home indicates that his behavior was very disruptive. Other Independence Home data indicate that Kevan made some progress during his stay but was unable to maintain consistently appropriate behavior.

He was placed back in his home in December, 1985.

Kevan was again removed from the home and placed in Greenwell Springs Psychiatric hospital in April, 1986 and remained there until August of 1986. While in the hospital, Kevan participated in a behavior modification program and was given Thorazine, 50 mg. and Vistaril, 25 mg. He was also receiving the medication upon his release, but it is unknown how long he took the medicine.

Kevan attended Zion City in the 8th grade (86/87 school year). His first 9 weeks grades were all "satisfactory" and he had few absences. His progress slowly deteriorated and by the third nine weeks he received all "unsatisfactory" grades. He was re-evaluated by the schoolboard Pupil Appraisal Services. By this age, 14.2, Kevan was functioning below grade level in all of the academic areas. His intelligence quotient testing (WISC-R) indicated that Kevan functioned in the low average range of intellectual ability. Kevan's attendance in school also decreased.

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Kevan began his involvement with the justice system in early 1987 with an ungovernable charge He entered into an informal adjustment arrangement with the East Baton Rouge Family Court. There is an indication in one of the Department of Public Safety and Corrections', Office of Youth Development (DPSC-OYD) report that Teodis was also charged with being "ungovernable" in 1986. Kevan was charged with a misdemeanor theft in January, 1987. In May, 1987, Kevan was adjudicated a "Child in Need of Supervision" and placed in the custody of the DPSC-OYD.

The DPSC-OYD placed Kevan in Reynolds Institute, a residential facility for youth, in May, 1987. Kevan remained in that facility until November, 1987, when he was removed because of his lack of progress and running away behavior. While in the facility, Kevan began the 9th grade at Ponchatoula High School. Kevan went home for a brief period of time, then was placed in Christian Acres, another residential facility for youth in the juvenile justice system. Christian Acres is located in Tallulah. In terms of overt behavior, Kevan seemed to perform better at this facility. He continued to get into trouble by running away and stealing items, such as cigarettes, from local businesses. Kevan was actually recommended for a successful release at one point, then he got into trouble again. One report in the record indicates that his behavior declined significantly when Mrs. Brumfield notified the facility that she did not have the money to have Kevan sent home for Easter, 1988.

Kevan was released from Christian Acres in August, 1988. He was placed back at home and attended Zion City

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School until his day placement in Baton Rouge Marine Institute (BRMI). He attended BRMI from November, 1988 to January, 1989. The BRMI records were destroyed during a fire and could not be obtained.

Age 17 to 20 (1989- 1993)

After he left BRMI (actual date of release in 12/88; official release on 1/2/89), Kevan was arrested for a misdemeanor theft and placed in East Baton Rouge Parish Juvenile Detention Center. He remained there until October, 1989, when he was committed to the Department of Public Safety and Corrections, but given credit for time served. Consequently, he was never placed in the juvenile correctional institution. Upon release Kevan moved back to his mother's home. He was officially dropped from the East Baton Rouge Parish school roster in October 1989. He evidently did not remain in the home much, resorting to living with different persons or other family members. Kevan indicated that it was during this time frame that he became more active in "drug dealing." He reported that he was economically dependent upon the drug trafficking to support himself and other family members. Kevan also began drinking heavily during this period. It was also during this time that he met his first serious girlfriend, Michelle Harris. Kevan had been involved with other women before, but it was on a more superficial level. He reports one child by a prior relationship. The child, Jamille, was born in 1990 and lives in Texas now.

In October, 1989, Kevan was a witness to a drug related shooting that left one person dead. He was originally

arrested, but the charges were dropped because another person was arrested for the offense. Kevan agreed to become a witness for the state in the case, but it was unnecessary because the person who committed the murder confessed. The police reports are confusing as to what really happened. Kevan appears to have been with several other youth in the housing project where the Brumfield's lived in the Zion City part of town when the incident took place.

Michelle is the mother of Kevan Brumfield Jr., who was born July 15, 1991. Michelle and Kevan stayed together off and on for a period of about two years. Michelle appears to be very devoted to Kevan, but stated that she was unwilling to maintain the disorganized lifestyle that he maintained. Kevan began keeping late hours and was drinking heavily and Michelle did not want her children raised in that type of environment. Kevan apparently cared for Michelle, but was simply unable to maintain a loving relationship. In spite of their somewhat tumultuous relationship, Michelle and Kevan have maintained a relationship, even though they have not been living together since 1992. Michelle Harris has maintained a continual friendship with Kevan's half-sister, Michelle Brumfield.

Kevan's life events can be followed though his medical records of 1991 and 1992. His medical records indicate that he sustained various medical injuries, ranging from being run over by a car to being shot several times. The medical records as well as his self report suggest that drug trafficking was an integral part of his life. Kevan reported that he was able to financially assist his mother

and his children through the drug business. Kevan denied that he used any drugs, but reported that he drank gin continuously and heavily.

Michelle Harris reported that she and her family often took care of Kevan, especially when he was hit by the car. Michelle indicated that Kevan's family was not available to him and generally "treated him like dirt." She described him as basically "homeless" during certain periods of his late teens.

Kevan became involved with Cassandra Holmes at some point during this time frame, most likely during early to mid 1992. Reportedly, Cassandra is somewhat younger than Kevan. From this relationship, another child was born, Tevan Brumfield Holmes, who was born on March 28, 1993. Tevan was born after Kevan was arrested for the current incident. It is unknown if Cassandra has maintained a relationship with Kevan since his arrest. Cassandra does not maintain a relationship with Kevan.

From the time Kevan left the juvenile detention center in 1989 until the incident for which he is charged, he seemed to live in various places, ranging from girlfriend's homes to apartments that he rented himself. Kevan was run over by a car in 1991 and dragged for a significant distance. his medical treatment was fairly extensive. He was the victim of a shooting in April 1992, at which time he was treated for three gunshot wounds. In November of the same year, he was treated for another gunshot wound to the forearm.

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Kevan attended Camelot Cooking School for approximately six weeks and worked for Ralph and Kacoo's and Western Sizzler during the early 1990's.

At the time he was arrested for the current incident, Kevan was living in Meadow Brooks apartments. He has been in East Baton Rouge Parish Prison since January 12, 1993.

SUMMARY OF KEY POINTS IN DEVELOPMENTAL HISTORY

In summarizing the key points in Kevan's history, it is essential to point out that the problems associated with Kevan's low birth weight or damaged birth have played a pivotal role in his development. As is often the case with children born with problems, minor and moderate problems become major obstacles as the child passes through each set of progressive developmental tasks. Kevan's birth history indicates that he was born with some type of decreased or lowered responses - the exact nature of which is unlikely to be known because of old and missing records. The effect of the early birth related deficiencies are indicated in several of the official records or evaluations of Kevan in later years. The birth problems alone cannot account for the ensuing difficulties that followed. The progression of male figures through the house undoubtedly influenced the type of modeling and parenting available to him. However, from all available data, it appears that Kevan functioned in his early childhood in an acceptable manner as long as he was in his own neighborhood or "territory," with a supportive

environment around him. He enjoyed being in Mississippi with his maternal grandmother and cousins. He does not recall any problems with the Mississippi school system where he attended the first and possibly the second grade.

One of the positive points about Kevan's early development is that he did seem to have some extended family support through his paternal grandmother and several aunts. However, it is difficult to estimate the type of parental support that was available to Kevan. Both parents report that they were attentive to their children. However, it appears more likely that Kevan and his older brother received inconsistent or sporadic attention from both parents, because of the termination of the relationship, the emotional maturity level of the parents and the chronological age and situation with the parents at the time Kevan was born. Mrs. Brumfield was involved in several relationships during Kevan's early childhood and was still having additional children. Mr. Ellis was obviously either "sowing wild oats" or interacting with the fringes of the criminal justice system when Kevan was young. Mr. Ellis denies an alcohol problem, although the existence of 1 or 2 Driving While Intoxicated (DWI's) in the early 1970's suggests otherwise.

The involvement with other family members during these early years was present and it is most likely these relationships that have produced some of the positive characteristics that are seen in Kevan today.

Unfortunately, the extended family support was not very available as Kevan entered the next phase of his life.

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During elementary school, there are several factors that combine to propel Kevan into the early stages of pre-delinquency. First, he enters the school system with some type of birth related educational deficiencies, with evidence of physiological limitations. All accounts of his behavior in the 3rd and 4th grades indicate that Kevan was "out of control." In speaking to teachers, the "out of control" behavior was not just temper problems, but a sincere inability to stay put in one place or to focus upon school related activities for any length of time. As Kevan progressed through elementary school his problems with the school structure and authority continued. Kevan appeared to perform fine when closely supervised and when he was in a one on one situation. However, he became belligerent in many group activities and in unstructured settings. One teacher stated that the other children tested and teased Kevan, which always resulted in his acting out behavior.

In a closer examination of Kevan's elementary years, his school behavior is reflective of the behavior of a child who is physically abused at home or who is witnessing some type of trauma. The early aggressive play and school related defiance are indicators that there were some type of problems in the home. While the birth related deficiencies and academic limitations partially account for his behavior, they do not completely explain it. During my inquiry into the possibility of abuse, stories eventually began to unfold during independent, open ended interviews with family members. The incidence of abuse, in combination with the birth related problems and academic limitations, is supportive of the type of behavior shown by Kevan in school.

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His school teachers were equally concerned about the behavior problems experienced with Kevan. Although referred for an Individual Evaluation in the 3rd grade, an unfortunate bureaucratic oversight resulted in the lack of an evaluation until the fifth grade. When asked about this oversight, Kevan's former teacher said that he was one of those children who unfortunately "fell through the cracks." Upon his eventual educational evaluation, Kevan was found to be "behaviorally disordered" (BD) and was placed in a BD class for the remainder of the fifth grade.

In addition to the diagnoses occurring late, its' accuracy seems questionable as well. At that time (1983), a great deal less was known about intellectual deficiencies than is known now. However, in reviewing the definitions for BD youth, it appears that the diagnosis is made when there is no evident of intellectual deficiency. Consequently, all of the Individualized Educational Plans (IEP) were developed without consideration being given to the fact that there was some type of intellectual deficit of a physiological basis. The plans were developed based upon the behavioral acting out only and failed to address the fact that Kevan was not processing information correctly.

Kevan was then placed out of the home at age 12. In a detailed review of all, official records, there is no indication that any agency or school questioned the possibility of physical abuse in the home. Upon questioning of Mrs. Brumfield, she replied that she was unaware of any abuse and that some of the "methods" used by Mr. Metevia did not harm the children. During all of Kevan's early years, there is every indication that Mrs. Brumfield probably

did the best that she could in raising the children. A victim of family violence herself, Mrs. Brumfield was and is somewhat emotionally detached from her children. In speaking with Kevan's teachers and in reviewing official records, Mrs. Brumfield saw that children were at school and clothed in an acceptable and clean manner. She attended parent-teacher conferences and communicated with the school when Kevan was in elementary school. It seems that the problem was that Mrs. Brumfield did not know very much about being a mother, in ways other than providing clothing and food to the children, through no fault of her own.

All of these circumstances in Kevan's background combine to produce the type of youth that emerged. Kevan was a failure in school and became involved in economic related drug trafficking. As generally happens in this type of setting, economic related drug trafficking propels the youth into situations with which they are ill prepared to deal. Kevan witnessed a "drug deal gone bad" killing in a housing project when he was 16 years old. He was briefly arrested in conjunction with the shooting, but the charges were dropped, evidently when he discussed everything with the police and the police interviewed other housing project residents. The person responsible form the crime confessed to the murder. The remainder of his criminal activities prior to the arrest for the current crime were drug related and seemed to be limited to the "drug world." Kevan's medical history during late adolescence suggests that he was shot and injured in other ways that can be related to a drug trafficking lifestyle. Kevan's young adulthood experiences lasted only two years prior to his incarceration for the current charge.

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ANALYSIS OF FACTORS INFLUENCING DEVELOPMENT

In an examination of the influential factors that shaped Kevan's development, individual characteristics are categorized into social, familial, educational, psychological, physical/medical and criminological. Kevan's life reflects a preponderance of early circumstances that were beyond his control and that interacted with other unfortunate life experiences to propel him into the current situation. The analysis of factors is not intended to excuse his behaviors; rather the analysis is offered as an explanation of how Kevan Brumfield became the person that he is today. The selected factors are examined because they are practical, theoretically sound and basic to human understanding.

Social Factors

The primary social factors that have played a role in Kevan's development are his income level or class and the environment in which he was raised. The fact that Kevan is an African American has played a less important role, although there are circumstances where race interacted with other situations to produce specific outcomes.

Many children are born into poverty and grow up to lead exemplary lives. Being born into a poverty level home is not, in and of itself, a significant factor in Kevan's development. The poverty, in combination with environmental instability, disorganized family situation, intellectual deficiencies, family violence and minimal job skills, produced a young man who was ill equipped to

compete with other children in school and other adults in the workforce.

Kevan's home and neighborhood environment were chaotic and disorganized. Kevan's home life was characterized by the presence of at least six male figures who moved into and out of the house over the course of fifteen years. Additionally, the neighborhoods described in various reports, especially during early adolescence, were transitional, at best, and unstable in most cases. The last neighborhood in which he lived during early adolescence was the Zion City area, an area described by Kevan's family as crime ridden. The 1989 shooting incident witnessed by Kevan was in a low income, crowded housing project. Several members of Kevan's family reported that once he returned from Independence home to the Zion City area, it was very difficult for Kevan to avoid association with older, tougher males. Again, living in an unstable neighborhood does not individually yield disordered children; rather it is the neighborhood in combination with the family situation, the lack of adequate role models and Kevan's history of being picked on and fighting with his peers.

A child with a progression of six 'fathers,' fifteen schools and five out of home placements by the age of 16, in combination with the individual deficiencies possessed by Kevan, may be described as experiencing unusual social influences throughout early childhood and adolescence. Many of these social factors account for Kevan's behavior, when taken in context with the other significant factors discussed below.

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Family Factors

Family related factors played a significant role in Kevan's development. Many of the factors are strongly related to the development of a criminal lifestyle, from an economic and psychological perspective. Kevan's family life was disorganized and lacked any real system of socialization. Some of the other children were able to overcompensate for these difficulties because of the involvement of grandparents (unrelated to Kevan) or because they possessed average or above average intelligence. It appears that some of the younger children are showing signs of dysfunction. Mrs. Brumfield seemed to try to instill appropriate values in the children, but was not successful in her endeavors. It appeared that Mrs. Brumfield had experienced a lack of modeling in her background or she may have been too overwhelmed with balancing the needs of her children with her need to maintain a connection with a male.

Kevan and some of his siblings learned a sense of right and wrong from several of the extended family members. Kevan's grandmothers and several aunts appear to have been instrumental in providing Kevan with the basic values of life, such as caring for the younger members of the family, watching out for children and not hurting others. Additionally, Mr. Ellis and Mrs. Brumfield provided this type of message to the children at various times during their development. The "socializing" functions that seemed to be missing in the family were around issues of honesty and personal responsibility. It did not appear that family members felt a great deal of

responsibility for each other, unless the responsibility was directed towards a child. On the other hand, during interviews with family members, everyone expressed a sense of responsibility for one another.

There was a definite conflict between what was said and what was actually done in this family. For example, Mrs. Brumfield reported that she had been "very protective" with Kevan and Teodis. Yet, records would reflect a different view. Both Teodis and Kevan felt that their mother knew the extent of the fourth "step-father's" abuse, but chose not to do anything about it. Mrs. Brumfield was working a great deal during the time the fourth step-father was in the home, but she has reported to be rather oblivious to the complaints that have been made about Mr. Metevia. She was aware of the fact that the neglect and abuse agency had been to investigate a complaint, but she attributed this to Kevan's manipulations.

In speaking to Kevan's teachers, they reported the same phenomenon, but to a greater degree. Both teachers reported that Mrs. Brumfield dressed the children for school in a clean and appropriate manner. She was always present for parent-teacher meetings. Mrs. Brumfield was even a chaperon on one of the children's school trips to Houston. Yet, she was unable to carry through with the emotional requirements of parenting. Upon questioning, one teacher reported that it was as if Mrs. Brumfield needed direction from the school in caring for her children.

School records do reflect that Mrs. Brumfield consistently participated in the required school activities, at least until Kevan became involved with the mental health center.

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The attendance of the children in school was also very consistent.

It is probable that Mrs. Brumfield simple did the best she could do under the circumstances, which has resulted in some conflicting views of her maternal role. Mrs. Brumfield's own account of the family violence in her background, in addition to her apparent need to maintain a male relationship, most likely accounts for the conflicts that are seen in her behavior.

Other family related characteristics influencing Kevan's development include the number of siblings in the home, the superficial support from extended family members, the lack of socialization function, the lack of close emotional bonding and the negative feelings among the older children as to the breakup of Mr. Ellis and Mrs. Brumfield.

The Brumfield-Ellis family is very complex and is suggestive of a number of plausible explanations for the plight of some of the children. One of the explanations that can be, at least partially substantiated, is the cyclical nature of abuse and neglect. It is probable that Mrs. Brumfield was raised in a violent home and is showing the generational attributes of such an upbringing. The inability to emotionally connect with others and the denial of family violence in her own home are two characteristics that are well associated with a background family violence.

Mr. Ellis is also difficult to explain. He reports that he has always "been there" for Teodis and Kevan, but there

is evidence that suggests otherwise. In talking to him, it is apparent that he cares for his sons a great deal. He was responsible for them in many ways when they were growing up. Both Mr. Ellis and Mrs. Brumfield report that there are "bad feelings" among the children because of their separation. Both suggest that the other lacks in parenting skills.

In interviews with Mr. Ellis, the concern for and belief in Kevan is perfectly obvious. Based on the officially and self reported data from Mr. Ellis, it is probable that he loved his children, but was not really in a position until recent years to participate in the "emotional" part of the relationship with his children. Like Mrs. Brumfield, he was largely oblivious to the conditions that the boys lived under with Mr. Metevia. Mr. Ellis' common law wife since 1976, Catherine Johnson, seems to be the parent that always knew what was going on in the Brumfield home and has consistently tried to provide alternative housing for Teodis or Kevan and any of their offspring. The Ellis' have shared their home with Kevan's second common law wife, Cassandra Holmes and his son.

In the case of Mr. Ellis, it seems that, like Mrs. Brumfield, he did the best he was able to do given the constraints under which he operated.

Kevan did not really have male role models for learning to make a living. The closest he came to understanding the need for job preparation and job skills was through his paternal grandmother, Mamie Ellis, who worked for Bishop Ott for 20 years, and through his maternal grandmother, who started Kevan and his cousins in selling

home-grown vegetables. Mrs. Brumfield worked off and on for Burger King and Mr. Brumfield had a variety of consistent carpentry jobs with the local plants.

In summary, Kevan has a large family, who report closeness, but show a lack of emotional support to one another. Some of the basic family functions were generally met through extended family or, later on, through Mrs. Brumfield or Mr. Ellis. The family was very disorganized, largely due to the number of male figures in the home, the abusive nature of one 'step-father' and the lack of socialization within the family constellation.

EDUCATIONAL FACTORS

The educational factors that affected Kevan's development were an outgrowth of the intellectual disabilities that he was born with, exacerbated by environmental conditions and an early adjustment disorder. Kevan was unable to process and retain information in a comparable manner with other children and was often "teased" by them. Additionally, there is ample evidence that he most likely experienced some type of visual perceptual deficiency. When his behavior disorder was combined with the learning deficits, his inability to get along with other children and the poor self esteem that emanated from all of his problems, the possibility of being educated decreased as he grew up. Kevan was controllable in the classroom by the special education teachers who were genuinely interested in him and who knew how to handle disordered children. As he grew up, the educational setting became increasingly threatening. Kevan often got

along very well in a protective classroom setting, only to become involved in fights or aggressive play and authority conflicts during recess.

Kevan's school behavior was indicative of the characteristics of children who experience trauma early in their lives. Impaired impulse control, inappropriate behavior, aggressiveness, emotional distancing, hypervigilence and authority conflicts are behaviors associated with some type of childhood trauma, generally related to abuse, neglect, violence and environmental deprivation. School difficulty, in particular aggressiveness with other children, is a primary indicator of childhood trauma. It is probable that Kevan's behavior worsened when his fourth "step-father" became an entrenched figure in the home and his mother began working and attending school, consequently leaving the children alone with the common-law step-father.

In a review of official records, it was found that Kevan was diagnosed as "behavior disordered" in the 5th grade, two years after his referral for testing. In a historical analysis of the records, it appears that the diagnosis and treatment did not consider the fact that Kevan had some intellectual deficits that affected his ability to perform. Although his teachers seemed to understand that Kevan experienced problems with attention span, concentration and physical ability to remain still, the Individual Educational Plans and other prescribed treatment failed to address the physiologically based problems that existed. Consequently, his behavior remained inconsistent and often uncontrollable.

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All three teachers and the official school records indicate that Kevan was unable to function in a group. He performed relatively well in a one-on-one situation.

It is interesting to note that one teacher referred to the fact that when Kevan entered Park Forest, it was the first year that students were being "bused" into the school for integration purposes.

Kevan's school behavior deteriorated as he grew up. When he was first removed from the home, Margaret Dumas Mental Health Center tried a variety of medications in hopes of improving his ability to participate in school in a comparable manner to other children. However, by that time, Kevan was well below grade level, was angry and simply could not fit into a public school setting, even in behavior disordered classes. Also, by this time, Kevan had been enrolled in numerous schools and his own feelings of inferiority would not permit any type of adjustment.

Kevan was enrolled in 14-15 schools prior to his eventual termination in 1989. He officially attended school through the 9th grade. As he grew up, he fell further behind in grade level. Kevan's educational records indicate that he consistently functioned in the low average or borderline range of intelligence.

PSYCHOLOGICAL FACTORS

Kevan's psychological problems were not really presented until elementary school, at which point he was placed in a situation where it was necessary to fit into some

type of interactive environment. Kevan indicates that he performed fine while in Mississippi (school records have been ordered). The first indication that Kevan experienced serious psychological difficulties was in the school system. Kevan was initially evaluated through the East Baton Rouge Parish school system in 1983 when he was in the fifth garde at Park Forest Elementary School. The 1983 evaluation was educational in nature and resulted in a diagnosis of Behavior Disordered, which was defined earlier in the current report. Because of the BD classification, Kevan was referred to the Margaret Dumas Mental Health Center for a psychological evaluation. That evaluation produced a diagnosis of "Adjustment Disorder with Mixed Emotional Features (DSM II, 309.28).

The next psychological evaluation performed on Kevan was in 1985, again at the request of the school system. Kevan was diagnosed at this point with a "Conduct Disorder, Undersocialized Aggressive" (DSMIII, 312). He was placed in Independence Home following this evaluation.

In 1986, Kevan was psychologically evaluated at Greenwell Springs Hospital, which is a psychiatric facility for adolescents. He was diagnosed as having a "Conduct Disorder, Undersocialized Aggressive again.

Kevan was not evaluated again until January, 1995, when he was referred to private clinical psychologist in regard to the current situation. In this psychological report, Kevan's history is discussed in relation to the current incident. The psychologist, Dr. Brian T. Jordan, indicates that Kevan is a sociopathic personality disorder, antisocial

type with poor impulse control. This report indicates that Kevan most likely suffered from a "neurologically based hyperactive disorder during childhood which merged with antisocial personality traits" later in life.

Most recently, Kevan was referred to Dr. John F. Bolter, who is a clinical neuropsychologist. Dr. Bolter also provides an analysis of Kevan's background. His results appear to be more revealing in that they offer some type of rational explanation for the type of educational deficiencies presented by Kevan earlier in his life. Dr. Bolter discusses the type of attention deficit problems experienced by Kevan. Although he does not feel that Kevan's attention disorder is an indication of severe neurocognitive deficit, he clearly indicates that the attention problems that are revealed in the current testing are suggestive of earlier learning disabilities. The diagnosis of earlier attention deficit/hyperactivity disorder provides an objective, physiologically based explanation for the type of problems that Kevan experineced earlier in school.

In a telephone interview with Dr. Bolter on June 20, 1995, he explained that the type of problems experineced by Kevan through earlier school reports suggested a learning problem to him. Kevan's low IQ is not really low enough to account for the degree of problems he experineced in school. Dr. Bolter also ruled out the possibility that Kevan had some type of organic memory problem. He stated that Kevan's primary problem is that he cannot "encode" or process information properly, so its meaning may be lost or altered. Secondly, Kevan has a real problem with concentration. Dr. Bolter analyzed these factors in terms

of Kevan's ability to participate in his defense and to behave appropriately during the court proceedings.

When asked if the deficits were present during Kevan's childhood, Dr. Bolter explained that these were characteristics that Kevan was born with and are indicative of the fact that he wasn't normal at birth, which is consistent with his low birth weight and other birth problems.

In reviewing all of the psychological data, it is apparent that Kevan experineced psychological problems in early childhood. The type of problems experineced by Kevan only reach the current level when they occur in combination with other difficulties. The significance of the psychological factors in Kevan's case is that the early diagnosis of a behavior disorder, which ruled out any type of physical deficiency, prevented him from getting the help that he needed through the school system. His family structure, social status and parental ability to assist him indicate that he simply wasn't able to get the help that he needed from his family. These circumstances, when combined with an abusive family situation, offer a plausible explanation for Kevan's escalation into antisocial characteristics upon reaching adulthood. The type of problems that the psychological data reveal are generally handled more effectively in an advocative and supportive family setting, thereby preventing the progressive deterioration of childhood problems into the current situation. It is probable that the psychological problems could have been effectively handled with an accurate diagnosis and a family situation that was

capable of addressing mild to moderate psychological and educational deficits. However, that was not the case for Kevan. Mrs. Brumfield performed the best way that she knew, but was generally incapable of dealing with Kevan, the other family problems and the commitments that she made to the men in her life. Mrs. Brumfield's denial about the type of abuse that Kevan and Theodis were exposed to is most likely some type of psychological self protective mechanism, a common occurrence among mothers of abused children, especially when the mother experineced family violence in her home.

In summary, the early presentation of psychological and educational deficits that were either ignored or misdiagnosed, combined with the other problems outlines have played a significant role in Kevan's development.

CRIMINOLOGICAL FACTORS

In assessing the criminological factors that were present in Kevan's life, the primary attributes that warrant examination are the family criminal history, the age of onset of deviant behavior, the type of crime committed in the past, the frequency with which crimes are committed and the motivation for committing illegal acts.

There appears to be minimal family history of criminal involvement in Kevan's natural family. Mr. Ellis, Kevan's father, admitted to a number of "run-ins" with the law after he was released from the military in the early 1970's. He also has been arrested and pled guilty to several other charges in the early 1980's that seem to stem from alcohol

related behavior. Mr. Ellis said that he had only had one misdemeanor conviction in his earlier life. Regardless of his history, Mr. Ellis reported that he has not had any difficulty with law enforcement since at least 1985.

Mrs. Brumfield denies any family history of criminality.

Both Mr. Ellis and Mrs. Brumfield deny a significant history among their other family members. Mr. Ellis though that an older uncle had been in trouble, but it was a long time ago. There was no reason to believe that either parent was currently involved in illegal activities of any kind.

From the reports about the various men in Mrs. Brumfield's life, it would not be unusual to discover a history of criminality among some of the men. However, there is no method for obtaining that type of information. Mrs. Brumfield reported that McDonald Metevia had an alcohol problem and had received at least one DWI when they were together. Subjective reports indicate that Ray Ross (#2) may have had at least one criminal act in his background.

Theodis is the only sibling that has indicated that he has been arrested in the past. Mrs. Brumfield reported that James, Kevan younger brother, had been picked up by the police on a minor misdemeanor charge.

One of the factors associated with criminality is the age at which deviant behavior presented itself. Kevan's first indication of deviancy was in the third grade. This

was the same year that he was referred for a school evaluation. Kevan's age of onset is young, in terms of criminal behavior. However, considering the school and family problems he experienced, the early onset of deviant behavior was a predictable path for Kevan to follow.

With this early onset, it is important to also examine the type of crime in which he has been involved. Most of Kevan's history indicates that he was not really a juvenile delinquent, rather he was dealt with in the juvenile justice system as status offender or "child in need of supervision." The types of problems Kevan presented as a juvenile were related to ungovernable behavior and minor illegal acts. Kevan's records from the Department of Public Safety and Corrections, Office of Youth Development (DPSC-OYD) indicate that Kevan was initially involved with the court in 1987 as an "ungovernable" child. He was 14 years old at the time. Later the same year, Kevan became a "child in need of supervision" on a misdemeanor theft charge, which involved stealing cigarettes. He had two additional contacts in 1987, neither of which was prosecuted. One charge was for damage to property and the other was simple escape. Both charges were related to an out of home placement. Kevan had two charges in 1988, one that was "no billed" for a simple battery and the other was a misdemeanor theft committed while in East Baton Rouge Parish Detention Facility. In reality, the first serious legal incident in which Kevan was involved was the 1989 "drug deal" murder, where he was arrested and then the charges dropped after an investigation.

Although official legal records of his adult criminal history were not available for the current report, Kevan

reports that he is facing charges for an armed robbery that occurred during a drug deal. He suggested that he had been charged with another robbery, but evidently, his involvement was questionable.

Kevan has consistently maintained that the extent of his illegal activity is confined to the drug world where he deals with other people "like him."

In summary, Kevan's criminal history is not very lengthy or complicated. The majority of his involvement with the juvenile court was either petty or related to his placement problems. The 1989 incident was the only matter of criminological seriousness, in terms of the relationship to serious and violent offending practices. The short period of non-confinement that he spent as an adult was undeniably associated with economically motivated drug trafficking. From medical reports, self reports and family interviews, Kevan's illegal activity seemed to be limited to the economic realities of the drug world and to the persons who operated within the drug world domain.

SUMMARY OF SOCIAL HISTORY FINDINGS

Through the extensive examination of records and multiple interviews with Kevan and his family, the history of his life, as it relates to the current situation, can be collapsed into a few summary observations. Kevan was born into a common-law home with the traditional physiological problems of low birth weight babies. His family of orientation was disorganized, unpredictable and incapable of providing the necessary socialization function. Kevan learned a great many values from older extended family members who spent time with him and

attempted to provide assistance to Mrs. Brumfield. Kevan's father was in close proximity to him during his early childhood years, but was not a consistent presence in his life. Prior to entering the first grade, there had already been three "fathers" in the Brumfield home. Kevan managed to perform in an acceptable manner until he was in elementary school, which coincided with the arrival of "father" number four. The fourth father figure was an alcoholic Vietnam vet whose idea of discipline was to have Kevan and his brother kneel for hours in a tin pan with rice in it. Although this father figure's family violence escalated to brutal treatment of the two oldest boys, there was no intervention from family members. Kevan's mother still maintains that she was unaware of the activities in the home, as she worked and went to some type of school.

Kevan's behavior in school was almost uncontrollable. He was referred for evaluation in the third grade and finally received the evaluation in the fifth grade. At that point it was determined that he was behavior disordered and there was no recognition of the serious physical problem he was experiencing with attention deficit/hyperactivity disorder. Later testing revealed that Kevan was most likely incapable of processing information and retaining it in a comparable manner to other children. All three special education teachers recognized hid serious problems, but were unsure of the reason for them. All three teachers also reported a genuine fondness for the child that they were able to work with on a one-on-one basis.

Kevan's deficits, in combination with the family disorganization and the abusive step-father, resulted in

his first out-of-home placement at the age of 10. Kevan was placed outside of the home on at least six occasions. Additionally, he attended 14-15 schools prior to his formal release from East Baton Rouge Parish Schools in 1989.

As Kevan reached legal status, he completed cooking school and worked for a brief time as a cook for Ralph and Kacoos Restaurant. By this time Kevan had become involved in at least two common-law types of relationships that produced children. Kevan began drug trafficking on the side as an economic supplement. He eventually gave up the cooking job because of his earning ability selling drugs. Kevan began drinking heavily and was constantly injured in one drug deal or another. His activities appear to be limited to the drug world prior to his arrest for the current incident. He is 22 years old now. Kevan was arrested for the current homicide shortly after his 20th birthday. Since Kevan was out in the adult world for such a limited time, there is a limited amount of information about his adulthood.

The social history on Kevan Brumfield attempts to explain the path that led him to the legal system today. There are still many questions about his upbringing that will never be fully known or understood. The history clearly establishes the traumatic combination of factors that have interacted to propel him into the current situation.

Signed by
Ariana Wall, MSW
Signed for
Cecile C. Guin, Ph.D., BCSW
Associate Professor-Research

APPENDIX V — PLAINTIFF'S EXHIBIT 33, REPORT OF DR. BOLTER, THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, ENTERED INTO EVIDENCE JULY 16, 2010

NEUROPSYCHOLOGICAL CONSULTATION

Name: Brumfield, Kevan
Date of Evaluation: 05/31/95
Gender: Male
Race: African-American
Age: 22 Years
Referral Source: Public Defender's Office

Reason For Referral:

Mr. Kevan Brumfield is a 22-year-old right-handed African-American male referred for a neuropsychological consultation at the request of his attorney. Mr. Brumfield is currently being detained while awaiting trial for first-degree murder. He underwent a pretrial psychological evaluation with Dr. Brian T. Jordan on January 19, 1995. Dr. Jordan indicated Mr. Brumfield was functioning within the Low Average range of general intelligence and demonstrated mid-elementary school achievement skills. His history, clinical interview and psychological test results were indicative of a sociopathic personality disorder with poor impulse control. Dr. Jordan also noted that the patient was probably suffering from a neurologically based hyperactivity disorder during childhood which merged with antisocial personality traits. Mr. Brumfield was referred for a neuropsychological evaluation to determine to what extent he may be manifesting neurocognitive deficits associated with organic brain impairment.

Appendix V

Background Information:

Mr. Brumfield was seen for a neuropsychological evaluation on May 31, 1995. At that time, Mr. Brumfield was being detained at the East Baton Rouge Parish Prison and was accompanied by three officers for security purposes.

Initially, his hands and feet were shackled but during the interview and evaluation his hands were free. He was interviewed regarding his history and current problems and difficulties independent of the officer's presence. The officers were placed in an observation room in order to ensure my privacy when seeing Mr. Brumfield. When questioned, he did not readily identify any areas of significant problems. He denied any specific neurocognitive deficits related to psychomotor functions, psychosensory functions, perceptual skills, attention and concentration, language problems, memory and learning problems, reasoning and active problem solving judgment. He further denied any physical complaints, including complaints of pain, illnesses or other recent traumas. He further denied the presence of any significant emotional problems, including depression and neurovegetatives associated with depression, anxiety symptoms or phobias, and disturbances in thought processes related to delusion or significant preoccupations. He also denied active hallucinations or illusions and further denied suicidal ideations. In effect, he was not offering any complaints or problems that would otherwise have been consistent with a recent change in his cognitive status.

Appendix V

With respect to Mr. Brumfield's medical background, Mr. Brumfield states that he was the product of a premature birth and weighed approximately 2-3 pounds at birth. He stated, however, he was not aware of any other complications associated with his mother's pregnancy. He further indicated that despite his low birth weight, he thrived and was not subject to any unusual childhood illnesses. He also reported he did not experience any significant illnesses as a child or young adult. He believes he is currently free of significant health problems. However, he does report a number of traumatic injuries but denied any associated residual sequelae accompanying these traumas. For instance, he suffered a nasal fracture as a result of being in a fight in 1987. He also reported that he was run over by a car in 1991, resulting in a brief period of hospitalization. In 1991 he was also shot three times in the back, for which he underwent surgical intervention. He recovered quickly from those injuries and denied any residual problems. He was shot a second time in 1992 in the right forearm and stated he shattered both bones in his right forearm, for which he underwent an open reduction and internal fixation. He also stated that he suffered a fracture to his mandible in 1994 as a result of being in a fight. His jaw was immobilized with wiring for about two weeks. He reportedly took the wires off himself without medical assistance and believes he recovered from that problem. He also admitted to smoking marijuana regularly and drinking alcohol heavily prior to his arrest, but not to the extent that he ever experienced any legal or social problems.

Appendix V

Mr. Brumfield also stated he underwent numerous psychiatric and social service treatments to control his behavior and poor conduct as a child. He reported being hospitalized in Greenwell Springs at the age of 12. During that hospitalization, he believes he was placed on Thorazine, a neuroleptic, but discontinued taking the medication subsequent to his discharge. He stated he was seen at Margaret Dumas Mental Health Center at the age of 10 to 11 and he was also placed on medication for conduct related problems. Again, he did not take the medication. He also reported being placed in a number of halfway houses as an adolescent because of his poor conduct and behavior. Mr. Brumfield readily admits to having had significant problems with compliance and authority as a young child and engaging in juvenile delinquent behavior, which included theft, truancy, runaway behavior, and temper and aggressive outbursts. His medical records also indicate that as an adolescent he was diagnosed as a Conduct Disorder, Under Socialized Aggressive Type. More detailed information regarding his previous psychiatric treatment are available in his records.

Mr. Brumfield stated he discontinued attending school at the age of 16 after completing the 10th grade. He denied any significant grade failures but also stated he had been placed in special education services for behavioral disordered children from the 5th grade until the time he left school. According to Mr. Brumfield, his placement in the behavioral disorder program occurred after expulsion from the 4th grade. He also indicated that he did have some pull-out regular class time from time-to-time. He admitted to being suspended multiple times,

although he stated he liked school. He also believes his problems with school were related more to conduct arising out of his difficulties at home than academic problems per se. He denied any significant learning related problems associated with reading, writing and simple arithmetic. However, previous testing with Dr. Jordan supported the impression that he had more limited academic skills than he admits. Previous test results suggest that his achievement skills are at the mid-elementary level, which would approximate the 4th through the 6th grade level. Sometime after leaving school he attended and graduated from Camelot Career College. He was certified a cook and after graduating from the six month training program in 1991.

Mr. Brumfield stated that he has never married but he has a total of five children. At the time of his arrest he was living with a woman named Casandra who is the mother of two of his sons, ages 2 and 3 1/2. He also stated that he has one prior relationship in which he as a daughter who is 2 1/2 years of age and an additional relationship in which he fathered two children who are now a boy age 3 1/2 and a girl age 5.

Mr. Brumfield indicated his family of origin include his biological parents and stepfather. He has one older male sibling from the same parents. This older brother was incarcerated for nine months and placed on probation for five years after being convicted of after-the-fact armed robbery. He believes his older brother was not prone to engage in criminal activities and indicated that he had not had a significant record prior to being charged and

placed in jail for knowledge of a crime. He also indicated that he has other half siblings from relationships that his mother has had. He has a set of half siblings named Michelle and James and another set named LaToya, Donna and McChez. Michelle is 19 and James is 17. Their father is deceased and Michelle is currently attending college. James has had some difficulty with learning over the years but is otherwise healthy and doing well and working part-time at a Burger King. Mr. Brumfield stated the other siblings are younger and are ages 10, 12 and 8 year of age. They are all reportedly doing well and are healthy. Their father is the individual that Mr. Brumfield identifies as his stepfather and apparently he resided with Mr. Brumfield's mother from 1982 through 1989 before separating.

Mr. Brumfield stated that his mother is currently 43 years of age and has reportedly been supportive of him since being charged with first-degree murder. She is employed at a Burger King restaurant and has been working at that facility for as "long as I can remember." Additionally, Mr. Brumfield stated that she is currently working part-time instead of the typical full-time work that she normally engages in in order to assist Mr. Brumfield. He also stated that he believes that she has generally good health but has had some difficulty with her blood pressure. She has no history of psychiatric problems, drug or alcohol related difficulty or learning deficiencies. She also graduated from high school and has worked hard throughout her adulthood. Mr. Brumfield stated that his biological father is 49 years of age and is a roofer by trade. However, he reports that his father does not always work

and he sees his father as being essentially "lazy." He has no history of criminal activity or psychiatric problems, including substance and alcohol abuse problems. The records indicate that his biological father and mother were separated when Mr. Brumfield was approximately three years of age. Mr. Brumfield also alleged that his stepfather was physically abusive and often beat Mr. Brumfield. He believes in part his difficulties in life have arisen as a result of his family structure or absence thereof and the beatings he endured at his stepfather's hand.

Mr. Brumfield stated that his work history is somewhat limited. In the past, he has primarily earned money through what he described as selling illicit substances, as well as selling firearms. He stated that while he was involved in crime, particularly theft, he did not involve himself in violent crimes. He believes he has been arrested approximately 10 times over the course of his young life but he has never spent substantial time in jail until his most recent arrest. He also admitted being arrested at the age of 16 and charged with first-degree murder and distribution of cocaine. He described this incident as occurring in connection with a relationship he had with two other people. By his own account, it was a dope deal that had "gone bad" and one of the individuals ultimately received a 21 year sentence for "negligent homicide." Mr. Brumfield and the other individual involved were released and he was not charged with a violent crime. Additionally, he stated that he had not worked any consistent job in the past. However, upon graduating from Camelot Career College in 1991 he worked at Ralph and Kacoo's on Bluebonnet for approximately three months.

He finally quit the job because his earnings were better through distributing drugs and selling firearms.

Other aspects of Mr. Brumfield's psychosocial background are available within his records. However, it is apparent from his records that he has a long history of conduct related difficulties and presents as an individual who indeed did suffer from a conduct disorder that has progressed to an antisocial personality disorder. He is not clinically offering complaints indicated that he tends to minimize medically related problems. When injured or hurt, he typically recovers quickly, often independently of medical advice and care. He also stated that he is not actively experiencing any mental health problems and can see nothing in his background that suggests he has ever suffered from a major psychiatric disorder.

Behavioral Observations:

Mr. Brumfield's sensorium was intact in all spheres. His thought associations were direct and linear. There was no evidence of thought derailment. His speech was intelligible and prosodic and there was no significant dysfluencies otherwise evident. He had no apparent psychotic related problems in underlying thought content. While he showed some evidence of fatigue as the evaluation progressed, he remained reasonably effortful throughout the evaluation and there were no other obvious aberrant qualities in his behavior that would have negatively impacted on the reliability and validity of the test results.

Mr. Brumfield was administered a comprehensive batter of neuropsychological measures directed at

assessing his level of intelligence, basic achievement skills, psychomotor functions, psychosensory and perceptual skills in visual, auditory and tactile domains, mental flexibility, attention and concentration, receptive and expressive language functions, learning and memory and complex problem solving or abstraction. The list of tests administered included the National Adult Achievement Reading Test (NAART), Wechsler Adult Intelligence Scale-Revised (WAIS-R), Wide Range Achievement Test-Revision 3 (WRAT-3), Lateral Dominance, Mechanical Grip-Strength Test, Name Writing Speed, Finger Tapping Test, Grooved Pegboard Test, Luria Motor Skill Assessment, Reitan-Klove Sensory-Perceptual Examination, Seashore Rhythm Test, Speech Sounds Perception Test, Benton Facial Recognition Test, Hooper Visual Organization Test, Trail Making Test, Stroop Neuropsychological Screening Test, Intermediate Visual and Auditory Continuous Performance Test (IVA), Reitan-Indiana Aphasia Screening Test, Clock Drawing Test, Benton Controlled Oral Word Association Test, Benton Visual Naming Test, California Verbal Learning Test, Wechsler Memory Scale-Revised (Logical Memory I and II, and Visual Reproductions I and II portions), and the Halstead Category Test. The patient was also asked to complete the Georgia Court Competency Test and the Bennett Criteria were reviewed.

Test Results:

The results of the Intellectual Assessment indicate that Mr. Brumfield is functioning within the Borderline range of general intelligence. He earned a Full Scale I.Q. of 75. His verbal intellectual skills, as well as perceptual

motor intellectual skills, fall within the Borderline range of functioning. His VIQ is 79 and his PIQ is 72. These results are lower than estimated by Dr. Jordan in January of this year but Dr. Jordan was using a screening measure which proves to be less reliable. Formal testing when he was 11 years old with the WISC suggested more dull normal intelligence and the present values also appear to be slightly lower than those reported. However, when these results are contrasted with that estimated from the NAART, they appear to be compatible with the predicted values. He also shows marked limitations in basic reading and spelling skills as well as arithmetic functions. His standard equivalents are 74 for Word Recognition Reading, 79 for Spelling and 83 for Arithmetic. Grade Level Equivalents are 4, 6 and 6 respectively. At this level, Mr. Brumfield should experience problems with reading complex material and some simple everyday material, such as magazine articles or newspapers. However, he does have at least rudimentary math skills that are sufficient to handle routine money transactions.

With respect to the subtest profile on the WAIS-R, Mr. Brumfield reveals mild to moderate intertest scatter. He has scores ranging from a high of average to a low of mentally defective. His strengths are noted in areas related to the ability to engage in simple mental arithmetic as well as nonverbal sequential reasoning. His poorest performances are found in areas related to social judgment and attention to small visual detail. He also shows some difficulty with sustained concentration when engaging in tasks requiring active mental manipulation. For instance, his forward digit span is approximately six digits while his reversal digit span is limited to three. The later finding

implies problems with more active concentration than might be evident on simple or casual observation.

Mr. Brumfield's performance on measures more objectively directed at attention and concentration revealed no significant problems in mental flexibility or simple mental tracking. His reaction times appeared to be normal with auditory and visual domains. He also revealed good reaction time consistency across both visual and auditory modalities. however, despite these normal responses, he does reveal problems with persistence as indicated by a tendency to be inattentive in both visual and auditory domains. This inattentive quality to his behavior is likely to be most often observed when he is required to persist with tasks that are monotonous and non-stimulating. This finding would also be supportive of the early attention deficit disorder suggested by Dr. Jordan. However, his attentional problems are not so severe that he cannot focus on task and appropriately attend when there is more intrinsic interest on his part.

Mr. Brumfield's motor functions appear to be intact in his upper extremities. He is not showing evidence of ideomotor or ideational apraxia. He has adequate mechanical grip-strength in both upper extremities. His fine motor control is also within normal limits, including finger oscillation and writing speed. However, there is mild slowing on a grooved pegboard task on the nondominant hand suggestive of mild fine motor incoordination on that side. However, this relative problem is not seen with simple unimanual and bimanual manipulation or motor sequencing tasks. His writing is also normal in appearance

and he does not reveal indications of dysgraphia. Simple sensory perceptual functions are similarly intact in the upper extremities. There is not a consistent finding of suppressions with bilateral simultaneous stimulation or problems of astereognosis and finger recognition. There are, however, a number of graphesthesia errors evident in the right hand but this in part appears to be related to attentional difficulties and learning the task. Such findings are also frequently seen in individuals with a history of learning disabilities. Taken together, there do not appear to be any consistent deficits in motor or tactile function that could be correlated with a lateralized cortical deficit.

Mr. Brumfield's auditory functions are intact. There are no suppressions with bilateral simulation. He has normal sound rhythm pattern recognition and speech sounds perception. Similarly, his visual fields are also intact. There is no evidence of suppressions with bilateral stimulation in any quadrant of his fields. He also demonstrates normal complex perceptual functions, including visual discrimination for faces and perceptual organization. There did not appear to be any clear indications of cortically based agnosias or primary perceptual integration problems in auditory and visual modalities.

With respect to language functions, Mr. Brumfield has normal articulation. While there are minor difficulties heard with polysyllabic articulation these difficulties are not atyical for someone of his cultural/educational background. Conforntative naming is intact and no significant problems with word finding were observed.

Appendix V

Repetition appears to be within normal limits. Spontaneous controlled fluency are within normal limits. Aural comprehension is intact. He does not show any pattern of letter-number agnosia. He also does not show evidence of acquired dyslexia, dyscalculia, and left-right confusion. Overall, Mr. Brumfield does not manifest cortically based depression or receptive language problems.

Mr. Brumfield was asked to complete two separate measures of memory processing. Initially, he was presented with tow prose paragraphs and four visuographic designs to immediately recall. His immediate recall is within normal limits for both types of material. However, his ability to retain that information over time reveals a high degree of loss. He has a 55% retention rate following 30 minutes delay for the nonverbal material. While these values are consistent with his intelligence, they also seem to be implying a relative weakness in memory that may be related to an organic based amnesia. Given the single exposure learning format of this material, is also possible this loss reflects poor organizational learning or attentional problems, both of which could contribute to poor attention. A more accurate reflection of his ability to acquire, retain and retrieve information would use testing that permits learning over time, such as a list presented multiple times. Mr. Brumfield was subsequently asked to listen to a list of 16 shopping items presented over five trials. With repeated exposure to the list, he revealed a pattern of normal learning and retention. There was no significant decrement in his learning curve and he revealed a good retention following short and long delays. Recognition testing also revealed 100%

accuracy, without a bias pattern in either the negative or false direction on recognition testing format. However, despite his good performance, there were clearly learning characteristics that make it more difficult for him to acquire new information. His approach is concrete (serial position learning) and he does not actively attempt to mentally organize the information to facilitate his learning (semantic learning). He also reveals a strong tendency to be inconsistent across trials and seemingly makes a number of perseverations on recall. However, the perseverations are distal and reflect more personal doubt at recall than actual true frontal type perseverations. since there are no other frontal signs in his overall behavior, it would be difficult to attribute these perseverative responses to anything but simple disorganization in his learning skills and poor self-monitoring. Taken together, these results indicate that Mr. Brumfield may be subject to moderate forgetfulness at times, particularly on one trial leaning situations. This degree of forgetfulness is not exceptional for someone of his intelligence. Moreover, when given opportunity for repeated exposure, his learning is more normal and he does not show a decremental loss in retention over time, suggesting that any difficulties he has with recall is not likely to be associated with an organic amnestic disorder.

Mr. Brumfield was asked to complete a complex measure of abstract reasoning and problem solving. On this particular test, he performed well and demonstrated a normal capacity to profit from feedback. He utilizes experience to modify his ongoing performance when attempting to solve problems. He also demonstrates normal

mental flexibility, and reasoning skills. His utilization of negative feedback also appears to be excellent, as indicated by a strong tendency to slow the rate of his responding as he determines how to modify his behavior as he determines the correct solution for a problem. With this problem solving situation, his impulse control is actually quit good. In effect, these results indicate that his problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness.

Conclusion:

Based on the present evaluation, Mr. Brumfield appears to be functioning within the Borderline range of general intelligence and within the Low Average to Borderline range for basic academic skills. Except for problems with complex attention associated difficulty in acquisition secondary to that problem, he appears to be normal from a neurocognitive perspective. He also has a normal capacity to learn and acquire information when given the opportunity for repetition and probably can attend when situations or circumstances carry more intrinsic interest for him. His problem solving and reasoning skills are also adequate and he is not showing lateralizing or focal deficits in neuropsychological functioning that would otherwise be indicative of an organic mental disorder.

Appendix V

Historically, this patient is presenting with a history consistent with a conduct disorder that appears to be primarily an adolescent onset type. This disorder has also progressed into an antisocial personality disorder. The issue of his attentional difficulties also seems to be suggestive of an early attention deficit/hyperactivity disorder that is a combined type. This condition is not severe enough to interfere with his ability to assist counsel in his own defense. However, his attentional skills may be somewhat taxed during monotonous or repetitive courtroom activities and it may be reasonable to treat this patient with an appropriate stimulant medication in order to maximize his capacity to attend.

Additionally, the results of the Georgia Competency Test yielded a raw score of 40, suggesting that he has adequate simple knowledge of the courtroom and proceedings, as well as the charges, consequences and recollection of the events leading up to his arrest to be judged competent for trial. The Bennett criteria were also reviewed and he has an awareness of the nature of the proceeding against him and the ability to assist in his own defense. No other specific accommodations need be made in considering his current capacity to assist with his counsel.

6/13/90
Date

/s/
John F. Bolter, Ph.D.
Clinical Neuropsychologist

APPENDIX W — PLAINTIFF'S EXHIBIT 34, REPORT OF DR. BRIAN JORDAN, THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, ENTERED INTO EVIDENCE JULY 16, 2010

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PSYCHOLOGICAL EVALUATION

Name: KEVAN BRUMFIELD

AGE: 22 Y/O, BM

DATE: January 19, 1995

REFERRED BY: Mr. Tyrone Brown, Assistant District Attorney East Baton Rouge Parish

PROCEDURES USED: Clinical Interview
Psychological History
Ammons Intelligence Test
Rorschach Test

Appendix W

MMPI
Thematic Apperception Test
Incomplete Sentences Test
State Trait Anxiety Test
Draw A Person Test
Wide Range Achievement Test
Bender Gestalt Test

BACKGROUND INFORMATION:

A review of school and Court records on the patient over a period of years reveals the following. Behavior problems began at a very young age. A 1983 school evaluation was done due to adult authority conflicts with teachers and fighting with peers. Significant loss of temper and poor handling of anger was cited. At the time he was living with his mother, Vella Brumfield, and his step-father. He had some contact with his natural father and spent weekends with him. Previous visits to a mental health center produced no change in his behavioral difficulties. He then spent 4 months at Greenwell Springs Hospital in 1986. Academic achievement was only slightly below grade level. Attention span was extremely short. Cognitively he was tested in the low Average Range. He was diagnosed as having inappropriate behavior under normal circumstances and placed in the Behaviorally Disordered Special Education classes. By age 15, records show a clear pattern of juvenile delinquent behavior characterized by staying out late at night, shoplifting, continuing to show quick loss of temper and aggression. It was felt that he needed high structure and supervision. In 1987, he was an ajudicated delinquent based upon theft of cigarettes from a store and other

delinquent acts. Subsequent placement in the Reynolds Institute, 1987, disclosed problematic behaviors and lack of cooperation with the treatment program which lead to placement in a more restrictive environment. In 1988 he was placed at the Christian Acres Home and apparently improved his cooperation. Having successfully completed this program, he was returned home.

He soon began acting out by missing classes at school and disobeying his mother. At age 16, reports indicate that there was no lasting effect of treatment facilities on his negative behavioral pattern. It should be noted that socio-cultural factors were not felt to be a primary influence on his problems. Further Court records show that in 1988 he was arrested for simple burglary of a gas station. 1989 Court records show an arrest for distribution of drugs and murder. He and someone else apparently shot a man as a result of a drug deal. Reportedly these charges were dismissed. Following that, he was convicted of armed robbery. At this time, January 1995, he is currently charged with capital murder.

CLINICAL INTERVIEW IMPRESSIONS:

The patient is a thin, tattooed, 22 year old black male. His affect reflected some underlying depression mixed with anger. As time went on his manner became more positive and verbal.

The patient's family background in brief consists of three brothers and three sisters. His parents apparently never lived together. He was raised primarily by his mother with

a step-father in the home until age 14. He never got along with him. He accused him of whipping a lot and accusing him of various problems. It is significant to note that he was punished more than his other siblings. It is noted in the background information given previously, the patient began a pattern of acting out behavior with authority conflicts and aggression with peers at a young age. He reported leaving home at age 16 to live with a cousin.

Since his late adolescence, he has lived at various places and basically pursued a street-type existence supporting himself with the sale of drugs. He admitted to using marijuana on a regular basis but denied the use of other drugs. He has been quite active socially. He reports having 5 illegitimate children who he does not support by 3 different females. He enjoys an active live style with socializing, drug deals and related aspects of night life. He is currently charged with capital murder of a police officer. He denies guilt. He states that another drug dealer identified him as the killer. This apparently was a bank night depository robbery where the officer and the victim were also shot by possibly several persons.

Focusing more closely on the previous murder charge in 1989 brought admission that in fact he did shoot at a drug user who refused to pay and drove away in his car. Apparently several other friends also shot this person and one was convicted with the charges being dropped against the patient. Several years later he was arrested for possession of cocaine and sentenced to two years in prison, 1/93. On or about that time he was also arrested on the current charge. At the time of the current crime he was faced with a possible jail sentence.

Appendix W

The patient reports a reasonably stable family life centered primarily around his mother. He did develop a positive relationship with his natural father who he visited as a younger child. He still sees him at the current time. All family members have visited him in prison and have shown concern. He reports having generally a mixed relationship with his mother. He reports that there were some difficulties when he was younger due to his acting out behavior. She was initially critical and not very closed to him but the relationship improved in the last 2 years.

Focusing more closely on his long history of behavioral problems produced several insights. He stated that he has always been quick to get into fights past and present. He hangs around with a group of approximately 10 other men who he calls "the boys". Compared to his friends, he is seen as quicker to fight. He also states he was shot several times in the past due to various confrontations and problems. He has also carried a gun on a regular basis for the past few years. He denies ever shooting anyone except for the previous incident in 1989. He states that he is sensitive about taking a human life and wouldn't want to do this. In this respect he reports almost all of his aggression has been confined to physical fighting. It was further clarified, that he has never used a gun in any of his fights although he has been "tempted to". In this respect he claims he is able to control his aggression. Temper problems have been historically true of him throughout his life. He reports having approximately 4 or 5 fights a year on the average. At the same time he reports "I have no enemies". In this respect he denies bearing grudges or seeking to get even with persons. As an example, the

man who shot him several years ago is currently in prison with him with no negative feelings between the two. He also admits that he has been lucky that he has not been hurt in the past due to his drug deals.

MENTAL STATUS EXAMINATION:

The patient is oriented to time, place and person. His intellectual functioning is slightly limited but generally close to the Average Range. He denies any excessive depression. He has never been suicidal. He reports having some depression since he has been in prison but not prior to this time. He denies he has any auditory or visual hallucinations. His conversation was goal directed and showed no signs of psychotic impairment. His conversation was logical and revealed no pecularities. He does report "bad nerves". His history reports that he was treated in a psychiatric hospital at age 8. Following that he was seen on a short term basis at a local mental health center. As an adult he states that he gets easily tense especially regarding anger. Furthermore he has used marijuana on a regular basis. He reports that this helps calm his nerves. Since being in prison he feels that the use of cigarettes approximately a pack and a half a day helps the situation. He has never been treated by a psychiatrist or at a mental health center in his adult life. It would appear that tension and anxiety quickly erupt in terms of arguments and confrontations with people, "tight and angry" sum up the description.

Appendix W

PSYCHOLOGICAL TEST RESULTS:

A battery of psychological tests reveals the following. The OTI shows the patient to be intellectually functioning generally in the low Average Range. This is consistent with previous school records. The WRAT shows him to be reading at approximately a mid-5th grade level which is also consistent with previous records. Personality testing shows a generally low level of anxiety and depression at this time. The MMPI reveals many characteristics of a Socio-pathic personality disorder with poor impulse control. Abnormal scale elevations reveal significant rebelliousness, acting out behavior and low guilt for actions. Historically there have been anti-authority attitudes and poor impulse control for conflict with peers. While he can control his actions in some situations, the patient can be capable of thinking without acting at times regarding consequences. As a child this was characterized by a conduct disorder with poor impulse control. During adulthood the characteristics merged into anti-social behavior as a way of life. This is also associated with a very probable hyperactive disorder during childhood. Further test results show low self esteem and feelings of inadequacy in the male role. This is compensated for by boasting, superficial masculine attention getting behaviors and bravado. The State Trait Anxiety Test shows generally low chronic and acute anxiety difficulties. Minor confrontations and provocations, among others, produce aggressive behavior in the form of fighting. The Rorschach Test showed no evidence of psychosis or major mental illness. Responses in general were rather limited and supeficial but showed no indications of loss

of cognitive integration. In general reality testing is adequate. Further projective test material shows limited ability to handle strong emotions which would produce unstable acting out behavior.

SUMMARY AND RECOMMENDATIONS:

The present psychological evaluation reveals the following. The patient is intellectually functioning at the lower end of the Low Average Range with mid-elementary school achievement skills. This is consistent with previous school records. The patient's history, current clinical interview impressions and psychological testing reveal a Socio-pathic personality disorder, anti-social type with poor impulse control. This is especially true in the area of aggression. In all likelihood there was a neurologically based hyperactive disorder during childhood which merged with anti-social personality traits. He has always been involved with anti-authority conflict and aggression with peers. His adult adjustment has been notoriously poor and characterized by a drug dealing, street type existence with many socio-pathic features. Quick physical aggression has been chronically evident and there has been at least one incident of assualt with a weapon on an impulsive basis in 1989. While most of the patient's criminal activities are probably thought through, he can engage in impulsive behavior at times.

s/
Brian T. Jordan, Ph.D.
BTJ:mk

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 20 2015
OFFICE OF THE CLERK

No. 13-1433

IN THE
Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

II. Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his intellectual disability has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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Irving Phillips & Nancy Williams, *Psychopathology and Mental Retardation: A Study of 100 Mentally Retarded Children*, 132 Am. J. Psychiatry 1265 (1975) 39

George W. Woods, et al., *Intellectual Disability and Comorbid Disorders*, *in* AAIDD, *The Death Penalty and Intellectual Disability* 279 (Edward A. Polloway ed., 2015) 39

INTRODUCTION

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that it is unconstitutional for the state to execute a person who is intellectually disabled.[1] Petitioner, Kevan Brumfield, was found to be intellectually disabled after a seven-day evidentiary hearing in federal district court – the only court to afford him an *Atkins* hearing. Nevertheless, he remains on Louisiana's death row.

Because Brumfield's 1995 trial pre-dated *Atkins*, no witness testified then that he satisfied the clinical criteria of intellectual disability, or that he did not. No witness was ever asked. Nevertheless, the penalty phase record revealed that Brumfield had scored an IQ of 75, that he has at best a fourth-grade reading level, that he spent much of his schooling in special education classes, that he needed someone to "help him function" both at school and at home, and that his "basic problem" was that he "could not process information." These are core indicia of intellectual disability.

Even after *Atkins*, however, the state postconviction court refused to afford Brumfield a hearing to demonstrate the appropriate clinical evidence of his intellectual disability. The court instead determined that Brumfield's pre-*Atkins* penalty phase record was itself sufficient to resolve his claim.

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[1] With the exception of quotations from the record or prior case law, this brief uses the term "intellectual disability" to describe the "identical phenomenon" historically referred to as "mental retardation." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

The state court's determination that Brumfield's pre-*Atkins* penalty phase record was dispositive of his intellectual disability was unreasonable and therefore not entitled to deference under 28 U.S.C. § 2254(d)(2). Independently, the state court's refusal to provide Brumfield with funding to develop the clinical evidence that was essential to demonstrate his intellectual disability, and thus his ineligibility for the death penalty, violated clearly established federal law and was not entitled to deference under 28 U.S.C. § 2254(d)(1).

For both reasons, the district court was justified in affording Brumfield a hearing under § 2254(d), and the Fifth Circuit's contrary decision should be reversed.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a) is reported at 744 F.3d 918. The district court's opinion (Pet. App. 17a) is reported at 854 F. Supp. 2d 366. Its order adopting the Magistrate Judge's Report and Recommendation (Pet. App. 99a) is unreported. The Magistrate Judge's Report and Recommendation (Pet. App. 101a) is unreported. The Louisiana Supreme Court's opinion rejecting Brumfield's application for supervisory and/or remedial writs (Pet. App. 168a) is reported at 885 So. 2d 580. The state trial court's oral denial of Brumfield's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (Pet. App. 170a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on February 28, 2014, and denied a timely petition for

rehearing on that same date. The petition for writ of certiorari was timely filed on May 29, 2014, and granted on December 5, 2014.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT

I. Capital Trial.

On January 7, 1993, off-duty Corporal Betty Smothers was killed during the course of an armed robbery while she was escorting a grocery store manager making a night deposit at a bank in Baton Rouge, Louisiana. Three men were involved in the robbery. Two were active shooters. The third drove the getaway car. There was no eyewitness testimony or physical evidence that linked Kevan Brumfield to the crime scene. Brumfield initially denied any involvement in the crime. After being interrogated, he confessed to having been the driver and, after further interrogation, to being one of the shooters.

Brumfield's primary defense at trial was that he was not present at the time of the murder and that he had been manipulated into giving a false confession after being interrogated for twenty hours, during which he was allowed neither food nor sleep, and was force-fed the interrogators' desired account of the events. The jury rejected that defense and found Brumfield guilty of first-degree murder.

II. Penalty Phase Proceedings.

At the sentencing hearing, the State's case for death focused largely on Brumfield's prior bad acts and the threat of his future dangerousness. The prosecution told the jury that "as long as he lives, others are in jeopardy and in danger." JA 152a. This danger would

exist, the State argued, even if Brumfield were to spend the rest of his life in prison:

> [T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with. . . . [H]e has no regard for anyone else, he has no regard for authority, he has no problem with brutalizing and killing police officers or battering them.

JA 152a-53a.

Brumfield's mitigation case focused primarily on his abusive childhood and the mental and emotional difficulties that he has had all his life. He did *not* put on a case that he was clinically intellectually disabled. No expert evaluated him for that purpose, and no witness was ever asked whether Brumfield is intellectually disabled.

Defense counsel called several of Brumfield's family members to testify about his difficult childhood. Counsel also presented the testimony of Brumfield's fourth grade teacher, and two experts: Dr. Cecile Guin and Dr. John Bolter. Dr. Guin was a social worker who described her role as developing "a profile of the person who's been found guilty of the crime so that everything about his life is known." JA 73a. She explained that, over the years, Brumfield had six different stepfathers or other temporary father figures. JA 82a. One, whom Dr. Guin described as "exceedingly abusive," would torture Brumfield and his siblings in profoundly disturbing ways. JA 83a. She told, for example, about

how he would decide which of the children in the household to beat by making each of them hold a finger in a glass of water. Whichever child's finger made the most ripples would get the beating. More often than not, the child whose finger trembled most was Kevan. JA 84a-85a.

Dr. Guin further testified that Brumfield's many problems manifested themselves literally from birth. She explained that Brumfield weighed only 3.5 pounds at birth. JA 96a. That, she said, is an indication "that something has gone wrong during the pregnancy." JA 76a. She explained that Brumfield "was born with slower responses than normal babies," and that "there is definitely a[n] indication that when he was born they knew that something was wrong at that point." JA 76a.

Dr. Guin explained that by the third grade, Brumfield's teachers "knew that there were problems," and they referred him for a special education evaluation at that time. JA 81a. Through a series of clerical errors in the East Baton Rouge School System, however, he remained in regular classes through the middle of the fifth grade. JA 87a, 98a. As Dr. Guin narrated, "the teachers know something's wrong with him, but can't get the help for him that's needed." JA 98a.

Dr. Guin testified that Brumfield appeared to have "learning problems" that were continuously misdiagnosed as a behavioral problem. JA 90a, 92a. Throughout that time, Brumfield manifested serious problems at school. She testified that he "simply couldn't" stay in his chair, JA 82a, and frequently acted out uncontrollably. JA 88a. "He could not function

with a lot of chaos" and thus did poorly even at recess. JA 86a, 88a. She explained that Brumfield was "teased at school all the time as a result of being different." JA 100a-01a. He had "impaired impulse control" and, whether at school or at home, needed someone to "help him function." JA 92a, 101a.

Dr. Guin described Brumfield as having "intellectual problems." JA 100a. She explained that Brumfield's teachers "questioned his intellectual functions" and "recognized the fact that he probably had a learning disability related to some type of slowness in motor development." JA 89a. Dr. Guin concluded that "Kevan's basic problem is that he – he could not process information." JA 98a. "When he received information, his mind did something a little differently with it than my mind would and your mind would." JA 98a.

Because of these issues, Brumfield spent much of his time in special education programs after the fifth grade. JA 87a-93a. He was transferred among fourteen or fifteen different schools by the time he was fourteen years old, and was committed to six out-of-home institutions beginning at age twelve. JA 94a, 101a.

Dr. Bolter, the only other expert to testify at the penalty phase, was qualified to testify to "the effects of brain injury or insult to somebody's central nervous system on their behavior." JA 124. He testified that Brumfield has "a basic deficit somewhere in the brain," and exhibits a "rapid rate of forgetting." JA 128a-30a. According to Dr. Bolter, Brumfield also appeared to have severe attention deficit disorder and to have developed "an antisocial personality" as he became an

adult. JA 127a-28a. Dr. Bolter further confirmed that Brumfield's very low birth weight put him at "risk of some form of potential neurological trauma," and that "this individual was in trouble many many many many years ago." JA 130a-31a.

He testified that he had administered a Wechsler IQ test to Brumfield and that Brumfield's score from that test was 75. JA 133a. He described this as "borderline general intelligence" and "on the low end of intelligence." JA 128a. He also described Brumfield's "academic skills" as "very poor." JA 128a. According to Dr. Bolter: "He's reading at about the fourth grade level, and that's simple word recognition. That's not even comprehension; that's just identifying [the words]." JA 128a. He testified that Brumfield's math and spelling were at about a sixth-grade level. JA 128a.

The entire penalty phase proceeding – from opening statements through jury deliberations – was completed in one day, at the end of which the jury recommended that Brumfield be sentenced to death.

III. State Postconviction Petition.

On March 25, 2000, Brumfield filed a petition for postconviction relief in state court alleging a number of grounds for relief from his conviction and sentence. JA 172a.

While that petition was pending, this Court decided *Atkins*, which held that intellectually disabled persons are ineligible for execution, "leav[ing] to the State[s]" the task of adopting an appropriate standard for intellectual disability. 536 U.S. at 317 (quotation marks omitted). Shortly thereafter, the Supreme Court of

Louisiana adopted the clinical definition of intellectual disability endorsed in *Atkins*. *See State v. Williams*, 831 So. 2d 835 (La. 2002). The court concluded that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *Id.* at 852-54.[2] The court further explained that a defendant would be entitled to an evidentiary hearing on his claim of intellectual disability where he "provides objective factors that will put at issue the fact of mental retardation." *Id.* at 857; *see also id.* at 858 n.33 (defendant must "com[e] forward with some evidence to put his mental condition at issue").

Following *Atkins* and *Williams*, Brumfield promptly amended his state petition to assert that he is intellectually disabled and that his execution would thus violate the Eighth Amendment. JA 193a-205a. Brumfield proffered the following objective facts indicating his intellectual disability:

- He had an IQ score of 75;
- He had a fourth-grade reading level;
- He was born with a very low birth weight (3.5 pounds);

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[2] As this Court did in *Atkins*, the Louisiana Supreme Court looked to definitions of the American Association of Mental Retardation and the American Psychiatric Association.

- Medical records from the time of his birth indicated "that he was born with slower responses than normal babies";
- He suffered from seizures as a child;
- He was placed in psychiatric hospitals and prescribed numerous psychiatric drugs;
- His learning and behavioral disabilities were noticed by his teachers as early as the third grade;
- He spent most of his schooling in special education classes; and
- At the age of 10, he was identified as having some form of learning disability.

JA 203a-04a.

Brumfield requested the opportunity to present further evidence of his intellectual disability at an evidentiary hearing. JA 205a. He also urged the court *not* to assume that it could resolve his intellectual disability based simply on the testimony provided at his penalty phase hearing. He warned that "while there was some intelligence related testimony, there is a complete absence of testimony or evidence dealing directly with the issue of mental retardation." JA 243a.

In conjunction with his *Atkins* claim, Brumfield asserted his entitlement to funding to investigate and retain the expert assistance needed to prove his intellectual disability. He specifically argued that until his request for funding was resolved, it would be "premature for this court to address [his] claims." JA

207a. This was the sixth time Brumfield had asserted his right to funding during the pendency of his postconviction proceedings. *See* JA 173a-74a, 176a, 181a-82a & nn.1-2, 184a-85a & nn.1-2, 187a-88a & nn.1-2.

On October 23, 2003, the state court held a "motions hearing," wherein it orally dismissed Brumfield's petition in its entirety. JA 240a; Pet. App. 169a-72a. According to the court, Brumfield had not "demonstrated impairment based on the record in adaptive skills" because the testimony at his penalty phase discussed his being "anti-social personality or sociopath" and "as someone with no conscience." Pet. App. 171a. The court thus decided that Brumfield "hadn't carried his burden placing the claim of mental retardation at issue." Pet. App. 171a-72a. The court's explanation, in full, was as follows:

> I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue – there was a lot of testimony by all on those in Dr. Jordan's report.
>
> Dr. Bolter in particular found he had an IQ of over – or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant

> hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Pet. App. 171a-72a.

The court then, for the first time, addressed Brumfield's entitlement to funding, stating that, to the extent that entitlement might have provided an independent basis for postconviction relief, it was denied. Pet. App. 181a.

Brumfield subsequently filed an application for supervisory writs with the Louisiana Supreme Court, which denied the application without an opinion. JA 245a.

IV. Brumfield's Evidentiary Hearing In Federal District Court.

On November 4, 2004, Brumfield filed a petition for a writ of habeas corpus in federal district court. Brumfield argued, among other things, that the state court's dismissal of his *Atkins* claim without a hearing and without funding violated 28 U.S.C. § 2254. The district court appointed counsel and, for the first time, Brumfield was provided funds to investigate his intellectual disability. Pet. App. 5a. Brumfield thereafter amended his habeas petition to include a wealth of evidence establishing his intellectual disability.

The district court agreed that the state court's decision was unreasonable under AEDPA. It concluded that the state court's denial of Brumfield's

Atkins claim without a hearing was based on the unreasonable determination that his pre-*Atkins* penalty phase transcript was determinative of his intellectual disability, in violation of 28 U.S.C. § 2254(d)(2). Pet. App. 36a-48a. The court also concluded that the state court's denial of funding for Brumfield to pursue his *Atkins* claim was contrary to this Court's decisions in *Atkins*, and *Ford v. Wainwright*, 477 U.S. 399 (1986). Pet. App. 30a-36a, 48a.

Consistent with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the court went on to consider the evidence that Brumfield had adduced regarding his intellectual disability. Based on testimony elicited from several experts over the course of a seven-day trial, as well as hundreds of pages of expert reports and exhibits, the court found that Brumfield is intellectually disabled. Pet. App. 98a.

The evidence supporting the district court's finding of intellectual disability was substantial and largely unrebutted. With respect to Louisiana's first prong, every expert who testified agreed that Brumfield's intellectual functioning was consistent with intellectual disability. Pet. App. 62a. The State's expert concluded that Brumfield had an IQ score of 70. Pet. App. 61a. Brumfield's experts obtained scores of 70 and 72, which, when adjusted for the Flynn Effect,[3] were more

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[3] As the district court described, the Flynn Effect is based on the "widely accepted fact in the scientific community" that "over time, the mean IQ scores of the American public on any given test increase." Pet. App. 63a-64a. This phenomenon requires that IQ scores from tests taken in the past be subject to a "downward

accurately considered scores of 65 and 70. Pet. App. 60a-61a, 65a. The evidence further showed that Brumfield's score of 75 from the time of his trial, properly adjusted, was itself a score of 70. Pet. App. 65a. As the district court observed, the uncontroverted evidence was that Brumfield's IQ scores – with or without adjustment – were consistent with intellectual disability, as that term is defined by Louisiana law. The State did not even attempt to argue otherwise. Pet. App. 62a.

With respect to Brumfield's adaptive skills, experts for both the State and Brumfield agreed, and found it uncontroversial, that Brumfield's prior diagnoses of antisocial conduct and attention deficit disorder were entirely consistent with intellectual disability. Fed. Tr. Vol. V[4] at 35-36 (State's expert testifying that a person can be diagnosed with conduct disorders, such as antisocial personality or attention deficit, *and* intellectual disability); Fed. Tr. Vol. IV at 34; Fed. Tr. Vol. I at 97-98, 185; Fed. Tr. Vol. VI at 42-43, 79-80. The evidence established that conduct disorders are on an entirely different "continuum" than intellectual disability, *see* Fed. Tr. Vol. VI at 118, and that there is a high instance of conduct problems in students who are intellectually disabled because they are consistently "being asked to do things that they can't do," Fed. Tr.

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adjustment . . to account for the subsequent IQ rise of the public which the older test itself does not capture." Pet. App. 64a.

[4] The federal evidentiary hearing transcripts are divided into seven volumes and can be found on the district court docket, at ECF Nos. 101-107.

Vol. VI at 79-80. The State's expert also expressed the view that intellectual disability is "much more difficult" to diagnose than a conduct disorder. Fed. Tr. Vol. V at 35.

As the district court observed, the expert evidence demonstrated that Brumfield suffers from severe deficits in the basic conceptual skills of language, reading, and writing. Due to a limitation in motor skills, for instance, Brumfield is unable to write freehand. Rather, he must use a piece of cardboard to write, whether the paper is lined or not. Pet. App. 75a; Fed. Tr. Vol. VI at 97-98. It takes Brumfield several days to write a single one-page letter. Fed. Tr. Vol. II at 73.

Furthermore, the evidence showed, and the State did not contest, that Brumfield had severe deficits in reading ability. Pet. App. at 75a-76a. Brumfield's reading skills reached a plateau at a fourth-grade level, Fed. Tr. Vol. VI at 104; *see also* Pet. App. 76a, and his adult reading habits remain consistent with someone who is intellectually disabled, Pet. App. 76a; Fed. Tr. Vol. VI at 101-06.

Experts further explained that Brumfield has basic "problems understanding language." Fed. Tr. Vol. VI at 122. As a child, he was unable to perform basic activities, unable to follow the rules of games, and unable to follow basic instructions. Fed. Tr. Vol. II at 68-69. He could not learn to tie his shoes until the age of 14 or 15. Fed. Tr. Vol. II at 72.

Experts also testified that Brumfield's "[s]chool testing records show lack of competence in virtually

every area," Pet. App. 76a, and that every historical record indicated that he was developmentally delayed and slow in comparison to his peers and siblings. Fed. Tr. Vol. II at 68-69. Furthermore, all of Brumfield's academic abilities "plateaued for the rest of his career" sometime around the fourth or fifth grade, notwithstanding that he later received individual attention and resources in special education classes – an outcome characteristic of persons with intellectual disability. Fed. Tr. Vol. VI at 86; Pet. App. 76a. Brumfield was "constantly shuttled between different schools and remained periodically in-and-out of mental health centers and special education classes." Pet. App. 76a. From ages eleven to sixteen alone, Brumfield was assigned to special education and placed in at least ten different schools and, in total, he attended fourteen to fifteen schools before dropping out in the ninth grade. Pet. App. 77a.

With respect to the age of onset of Brumfield's intellectual disability, as the district court observed, there was hardly any dispute that it set in before Brumfield reached adulthood. Pet. App. 91a, 94a, 96a. Furthermore, experts testified to several etiological factors signaling that Brumfield is intellectually disabled. Brumfield's mother had psychiatric problems during her prenatal period and took psychotropic medication during pregnancy. Pet. App. 94a. Brumfield suffered from fetal stress and was only 3.5 pounds at birth. Pet. App. 94a. In addition, several of Brumfield's family members suffer from intellectual disability, including at least one cousin with severe to moderate intellectual disability. Pet. App. 94a.

Throughout his childhood, Brumfield was institutionalized, neglected, and suffered severe physical abuse at home. Pet. App. 95a.

Based on this evidence, the district court found that Brumfield is intellectually disabled and that it would be cruel and unusual to execute him.

V. **Fifth Circuit's Reversal.**

The State appealed to the Fifth Circuit. The State never disputed that the state court's denial of Brumfield's *Atkins* claim violated § 2254(d)(2) because it was based on the unreasonable determination that the evidence presented at the penalty phase hearing was determinative of his intellectual disability. Rather, the State argued (incorrectly) that this Court's decision in *Pinholster*, 131 S. Ct. 1388, necessarily barred a district court from holding an evidentiary hearing whenever the state court adjudicated the petitioner's claim on the merits. According to the State, "where, as here, the state district court issued a ruling on the claim's merits" it necessarily followed that "[n]o federal court evidentiary hearing was appropriate." Brief of Respondent-Appellant at 15, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713227. The State thus found no occasion to address § 2254(d)(1) or (2).

In response, Brumfield argued that the evidentiary hearing was proper because the state court's decision was not entitled to AEDPA deference. He specifically argued that "[t]he state court's reliance on penalty phase evidence to establish adaptive skills deficits" was "an unreasonable determination of the facts in light of the evidence presented in the state habeas proceedings

in violation of § 2254(d)(2)." Brief of Petitioner-Appellee at 50-51, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713226. Brumfield further argued that "[w]hen a Louisiana state court relies on record evidence from a pre-*Atkins* sentencing that, on its own terms, does not even relate to mental retardation, it cannot be deemed to have made a reasonable factual determination as a matter of law." *Id.* at 51-52. In addition, Brumfield argued that the state court's refusal to fund access to an expert was contrary to *Atkins*, *Ford*, and *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See id.* at 42-50.

The Fifth Circuit reversed, concluding on its own accord that the state court had not violated § 2254(d)(1) or (d)(2). In its opinion, the Fifth Circuit expressly acknowledged the district court's conclusion that the state court based its decision on an unreasonable determination of the facts by treating Brumfield's penalty phase evidence as determinative of his intellectual disability. *See* Pet. App. 14a (stating that the district court "chided the state court for relying on evidence presented for mitigation purposes"). Inexplicably, however, the Fifth Circuit reversed the district court without even considering that dispositive analysis.[5] Instead, the Fifth Circuit held in conclusory

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[5] The Fifth Circuit's failure to confront the district court's reasoning may have been because, as described above, the State itself never contested the district court's § 2254(d)(2) analysis, or because the Fifth Circuit initially held that Brumfield had waived any argument under § 2254(d)(2), *see Brumfield v. Cain*, 740 F.3d 946, *withdrawn and superseded by*, 744 F.3d 918 (5th Cir. 2014) (Pet. App. 1a) – an inexplicable conclusion in the face of Brumfield's explicit briefing on § 2254(d)(2). On rehearing, the

fashion that "the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing" because "the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation." Pet. App. 14a. In doing so, the Fifth Circuit itself turned to the record at Brumfield's pre-*Atkins* penalty phase proceeding. The state court's denial of an *Atkins* hearing was reasonable, according to the Fifth Circuit, because "no one testified that Brumfield was mentally retarded," and because "the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality," and "[t]here was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships." Pet. App. at 15a.

The Fifth Circuit also held that the state court's failure to provide funding for an expert was not contrary to this Court's precedent because "there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case." Pet. App. at 12a.

Ultimately, the court concluded that "there was no reason for the district court to conduct an evidentiary hearing" and that it must "disregard the evidence adduced for the first time before the district court." Pet. App. 15a.

Fifth Circuit amended its original opinion to make clear that Brumfield had not waived the argument, but did not further supplement its analysis on the § 2254(d)(2) issue. *See* Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

In the wake of *Atkins v. Virginia*, the state postconviction court's refusal to grant Brumfield's request for a hearing on his claim of intellectual disability was inexplicable.

That refusal was based solely on a review of a sentencing record that had been developed years before this Court first held that persons who are intellectually disabled are ineligible for the death penalty, years before this Court endorsed the prevailing clinical standards for intellectual disability, and years before the State of Louisiana first adopted its own definition of intellectual disability based on those standards.

At the time Brumfield's penalty phase record was developed, intellectual disability did not render one ineligible for the death penalty. Nor, at that time, were the clinical standards relevant for any other purpose under Louisiana's criminal law. It is thus unremarkable that the sentencing record reviewed by the state postconviction court did not directly address those clinical standards and definitions. The record says little or nothing about Brumfield's deficiencies in adaptive skills and, in fact, does not directly address intellectual disability at all. No witness testified as to whether Brumfield was intellectually disabled or whether he met any of the clinical criteria that define intellectual disability. No witness was ever asked. The state court's conclusion that Brumfield had not "demonstrated impairment based on the record in adaptive skills" should have been expected.

Nevertheless, Brumfield's pre-*Atkins* record revealed that he scored an IQ of 75 on the Wechsler Adult Intelligence Scale – a score that is consistent with intellectual disability. The record showed, moreover, that "something was wrong" with Brumfield from birth. He was born with abnormally slow responses. He was recommended for special education programs as early as the third grade, and was enrolled in them two years later. One of his most significant problems, the record indicated, was that he simply could not process information the way everyone else did. Even in adulthood, Brumfield could read only at a fourth-grade level at best. The record showed that his math and spelling skills were at a sixth-grade level.

This, in the language of § 2254(d), was "the evidence presented in the State court proceeding." The state court's determination that these facts did not even require a hearing on Brumfield's intellectual disability was patently unreasonable. Accordingly, the district court was justified in conducting an evidentiary hearing under § 2254(d)(2), and the Fifth Circuit erred in reversing that decision.

The Fifth Circuit's decision was erroneous for the second, independent reason that the state court's decision was contrary to, and an unreasonable application of, this Court's clearly established law. In *Ake v. Oklahoma*, this Court held that, when an indigent capital defendant shows that his mental condition will be a "significant factor" at trial or sentencing, the centrality of expert testimony in evaluating insanity requires a state to assure access to a mental health expert. 470 U.S. 68, 83-84 (1986).

Here, the postconviction proceeding was Brumfield's first opportunity to raise his *Atkins* claim. In that posture, the state court's denial of his repeated requests for assistance in obtaining expert testimony to demonstrate his intellectual disability cannot be squared with *Ake* or any reasonable application of its principles.

Similarly, in *Ford v. Wainwright*, this Court held that due process guarantees to capital defendants asserting an insanity defense the opportunity to present expert testimony in opposition to the state's contrary evidence. Otherwise, the state denies the defendant his constitutionally guaranteed "opportunity to be heard" and "invites arbitrariness and error." 477 U.S. 399, 424 (1986). Here, the state court denied Brumfield's claim for assistance to develop expert evidence of intellectual disability only *after* denying his *Atkins* claim altogether. That deprived Brumfield of the opportunity to obtain an expert by any other means, thus depriving him of the right guaranteed under *Ford*.

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Brumfield was denied that fair opportunity. The state court's refusal to assure him access to the expert assistance necessary to demonstrate his intellectual disability – and therefore his ineligibility for the death penalty – was contrary to, and an unreasonable application of, the rules announced in *Ake*, *Ford*, and *Atkins*.

Accordingly, the Fifth Circuit erred in holding that § 2254(d)(1) precluded an evidentiary hearing in federal court.

ARGUMENT

Under 28 U.S.C. § 2254(d), a federal court may grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" where the adjudication "resulted in a decision" that (1) was "contrary to, or involved an unreasonable application of" this Court's clearly established precedent or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Though these standards are "highly deferential," *Pinholster*, 131 S. Ct. at 1388 (quotation marks omitted), this Court has made clear that "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal court may, "when guided by AEDPA, conclude [a state court's] decision was unreasonable or that the factual premise was incorrect." *Id.*

Section 2254(d) poses no bar to federal habeas relief in this case for two independent reasons. First, the state postconviction court's denial of Brumfield's *Atkins* claim was based on an unreasonable determination of the facts, under § 2254(d)(2). Second, the same court's failure, notwithstanding Brumfield's indigence, to fund access to expert assistance qualified to evaluate intellectual disability was contrary to and an unreasonable application of this Court's clearly established precedent, under § 2254(d)(1). Accordingly, AEDPA imposed no bar to the federal district court's

decision to provide Brumfield with his first and only opportunity to have a hearing regarding his intellectual disability. That court – the only court to hear expert testimony on whether Brumfield is intellectually disabled under *Atkins* and the relevant clinical standards implementing it – found that Brumfield is, in fact, intellectually disabled. Contrary to the Fifth Circuit's erroneous legal conclusion, there is no basis for invalidating that determination of ineligibility, and no reason to insist that Brumfield should not have been afforded a hearing in any court.

I. The Denial Of Brumfield's *Atkins* Claim Was Based On The Unreasonable Determination That His Pre-*Atkins* Penalty Phase Record Provided An Adequate Basis To Resolve His Intellectual Disability.

Brumfield was sentenced in 1995, when this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), taught that intellectually disabled persons were not ineligible for the death penalty. Seven years after Brumfield was sentenced, this Court recognized the nation's "evolving standards of decency" and articulated for the first time that the Eighth Amendment prohibits the execution of an intellectually disabled person. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quotation marks omitted). The Court explained that "because of their impairments," intellectually disabled persons "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the

reactions of others." *Id.* at 318. These diminished capacities increase the risk that the death penalty will be misapplied because defendants with intellectual disabilities are more likely to give false confessions, are less able to assist their counsel and make a persuasive showing in mitigation, and are typically poor witnesses whose demeanor is often misinterpreted by juries. *Id.* at 320-21.

Though implementation of the new proscription was left to the states, the Court endorsed a "clinical definition[] of mental retardation" that reflected a consensus among the states. *Id.* at 318. Specifically, the Court explained that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* This three-part inquiry was taken directly from the tests set forth in the two leading psychiatric diagnostic manuals, from which the Court quoted at length. *See id.* at 308 n.3 (quoting American Association on Mental Retardation (AAMR), *Mental Retardation: Definition, Classification, and Systems of Support* 5 (9th ed. 1992); American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000) ("DSM-IV-TR")).

Shortly thereafter, the Louisiana Supreme Court adopted for the first time essentially the same clinical definition. *See Williams*, 831 So. 2d 835. It held that a defendant must show "three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in

several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *Id.* at 854; *see also id.* at 853 & n.26 (relying on AAMR, *Mental Retardation: Definition, Classification, and Systems of Support* 1 (10th ed. 2002) ("AAIDD 10th ed."),[6] and DSM-IV-TR at 41).[7] *Williams* explained that not every death row defendant would be entitled to a post-*Atkins* hearing to determine his or her intellectual disability. Rather, "[i]t will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation." *Id.* at 857; *see also id.* at 858 n.33 (a defendant establishes his entitlement to a hearing by "coming forward with some evidence to put his mental condition at issue").

Because Brumfield was convicted and sentenced long before *Atkins*, it was during his state postconviction proceeding that he was first able to assert that his intellectual disability rendered him ineligible for the death penalty. Upon doing so, the state court not only denied him postconviction relief on that basis, but denied him even a hearing to

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[6] AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD").

[7] Louisiana subsequently adopted a statutory definition of intellectual disability, which was based on the same three factors. *See* 2003 La. Sess. Law Serv. Act 698 (current version at La. C. Crim. P. art. 905.5.1(H) (2014)). The procedures set forth in that statute do not apply to cases such as this one, in which the defendant was convicted and sentenced prior to its passage. *See State v. Dunn*, 974 So. 2d 658, 662 (La. 2008).

demonstrate that he met the clinical definition of intellectual disability articulated in *Atkins*.

In a two-paragraph oral ruling at what was labeled a "motions hearing," the state court looked exclusively to the existing pre-*Atkins* sentencing record and denied a hearing because "the defendant hadn't carried his burden placing the claim of mental retardation at issue." Pet. App. 171a-72a. The court justified its determination with three points. First, a defense expert called at the penalty phase found that Brumfield had an IQ score of 75 and another expert – who did not testify – "came up with a little bit higher IQ." Pet. App. 171a. Second, Brumfield had not "demonstrated impairment *based on the record* in adaptive skills." *Id.* (emphasis added). Third, the defense mitigation expert testified that Brumfield "did have an anti-social personality or sociopath, and explained it as someone with no conscience." *Id.*

None of those facts – individually or collectively – provided a reasonable basis for denying Brumfield a hearing on his *Atkins* claim. Nothing in his pre-*Atkins* sentencing record was dispositive of whether Brumfield was or was not intellectually disabled. Nevertheless, the record contained testimony regarding numerous objective factors that were not only consistent with, but strongly indicative of, intellectual disability. That there was not more evidence in the record, or that the record did not address all of the elements of the clinical definition of intellectual disability and adaptive functioning was irrelevant to whether Brumfield was, in fact, intellectually disabled. To expect more would demand

far too much of the pre-*Atkins* record, as it simply was not developed for that purpose. It was an unreasonable determination for the state court to definitively reject Brumfield's claim of intellectual disability without a hearing and based solely on the pre-*Atkins* penalty phase record in this case. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court acted unreasonably under § 2254(d)(2) when it made a finding that was unsupported by the record); *Miller-El*, 537 U.S. at 340 (§ 2254(d)(2) does not bar federal court review where state court's determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding").

1. *Brumfield's IQ Score.* The only evidence cited by the state court that was relevant to Brumfield's intellectual disability was Dr. Bolter's testimony that Brumfield received an IQ score of 75 on the Wechsler Adult Intelligence Scale. Pet. App. 171a, JA 133. As the state court appeared to recognize by proceeding to consider Brumfield's adaptive functioning, Pet. App. 171a, an IQ test score of 75 is entirely consistent with intellectual disability. Louisiana courts have recognized as much. *State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) (explaining that the petitioner's "two scores of 75 brush the threshold score for a mental retardation diagnosis" making his diagnosis "heavily dependent on his adaptive functioning"). So, too, has this Court. *See Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation

definition."); *Hall*, 134 S. Ct. at 2000-01 (holding that it is unconstitutional to prevent a defendant from presenting evidence of deficits in adaptive skills where the defendant's IQ score ranged from 70 to 75). Likewise, the DSM-IV, which was relied on authoritatively both by the Supreme Court of Louisiana, *Williams*, 831 So. 2d at 853; *Dunn*, 41 So. 3d at 469-70, and *Atkins* itself, 536 U.S. at 308 n.3, made that clear. *See* DSM-IV-TR at 41 (a score of 75 on the Wechsler IQ scale is consistent with subaverage intellectual functioning).[8]

2. *Adaptive Skills.* Turning to the second prong of the inquiry, the state postconviction court found, without elaboration, that "I do not think that the defendant has demonstrated impairment based on the record in adaptive skills." Pet. App. at 171a. The "record" to which the court referred was the pre-*Atkins* penalty phase record. That reveals starkly just

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[8] The state court also stated that "Dr. Jordan actually came up with a little bit higher IQ." Pet. App. 171a. Dr. Jordan did not testify at the trial or penalty phase and thus did not explain his results. Rather, this comment was a reference to the following snippet of Dr. Bolter's testimony: "Dr. Jordan rated his intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning." JA 133a. Given that the record contained no further evidence of Dr. Jordan's test methodology or results beyond this vague comment from Dr. Bolter, and that Dr. Bolter was *critiquing* Dr. Jordan's methodology, this testimony is not a basis to reject Brumfield's intellectual disability claim. Indeed, the state court itself seemed not to think so, given that it turned to Brumfield's adaptive functioning.

how unreasonable the court's factual determination was.

At the time of Brumfield's sentencing hearing in 1995, Louisiana, consistent with *Penry*, 492 U.S. 302, did not prohibit the execution of intellectually disabled persons, and did not recognize a definition of intellectual disability (or adaptive functioning) for *any* purpose in criminal cases. *See Williams*, 831 So. 2d at 853 ("Louisiana is not one of the states that has directly addressed, either legislatively or jurisprudentially, the issue of mental retardation in the criminal context."). Only *after Atkins* did Louisiana first recognize a clinical standard of intellectual disability in the criminal context, which required a defendant to establish significant impairment in adaptive skills, *id.*, and explain that, concurrent with the AAMR and APA, this requires specific inquiry into the defendant's "conceptual, social, and practical adaptive skills," *Dunn*, 41 So. 3d at 459.

That there was no discussion of adaptive skills in Brumfield's pre-*Atkins* sentencing record was determinative of nothing and should not have been surprising. At sentencing, Brumfield did not attempt to mitigate on the basis that he met the clinical definition of intellectual disability. No witness – expert or lay – offered an opinion or was ever asked whether Brumfield was intellectually disabled under any definition. Nor were either of the two mitigation experts engaged to opine on whether Brumfield was intellectually disabled. Dr. Guin was a social worker who testified regarding Brumfield's social and family history. JA 62a, 71a. She did not, nor would she have

been qualified to, testify about whether Brumfield met the clinical definition of intellectual disability. Dr. Bolter was an expert qualified to testify to "the effects of brain injury or insult to somebody's central nervous system on their behavior." JA 124a. He gave testimony on whether Brumfield exhibited "neurological deficits" or "organic based amnesia," gave brief testimony about Brumfield's very low birth weight, and about the medications that Brumfield was taking. JA 127a-29a, 130a-32a. He further acknowledged that he had only a "cursory understanding" of Brumfield's personal history. JA 131a.

Thus, as the district court observed, numerous factors that would have been necessary to evaluate Brumfield's adaptive functioning – "including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naive, and (4) whether he has any practical skills" – were "simply lacking in discussion or even mention." Pet. App. 45a; *see also* Pet. App. 44a ("[T]he actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts [now] use to assess mental retardation.").

This demonstrates the dramatic difference between Brumfield's mitigation case (in which clinical intellectual disability was not raised) and an *Atkins* hearing. The penalty phase testimony of Dr. Bolter, upon which the state court relied in denying Brumfield's *Atkins* claim, filled a total of nine pages of double-spaced transcript. *See* JA 123a. By contrast,

when Brumfield finally was provided the opportunity to present clinical evidence of his intellectual disability in federal court, experts testified over the course of seven days, filling over 1,200 pages of transcript and hundreds of pages of expert reports and exhibits. The absence of direct testimony regarding Brumfield's adaptive functioning in the penalty phase record, notwithstanding his 75 IQ score, underscores the unreasonableness of relying on that record to determine the clinical fact of intellectual disability. *Cf. Hall*, 134 S. Ct. at 1999 (holding that when a defendant's IQ score is 75 or below, "the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits").

There is good reason why the clinical criteria of intellectual disability that are the focus of an *Atkins* hearing would go unaddressed in a pre-*Atkins* mitigation presentation. Prior to *Atkins*, a defendant's intellectual disability was one individualized factor out of an "extremely broad" universe that could have been introduced in mitigation. American Bar Association (ABA), *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1060-61 (2003). Moreover, it was often *not* the most effective way "to construct a persuasive narrative in support of the case for life." *Id.* at 1060-61. Indeed, in *Penry* – which was governing law at the time of Brumfield's trial – this Court rejected the contention that clinically intellectually disabled people "inevitably lack the cognitive, volitional, and moral capacity to act with the

degree of culpability associated with the death penalty." 492 U.S. at 338 (opinion of O'Connor, J.). If the contention that intellectually disabled persons should be spared the death penalty did not convince a majority of this Court at that time, it is hardly noteworthy that intellectual disability was not presented to a death-qualified jury in East Baton Rouge Parish, Louisiana.

Furthermore, as this Court explained in both *Penry* and *Atkins*, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321 (citing *Penry*, 492 U.S. at 323-25); *see also Bobby v. Bies*, 556 U.S. 825, 836 (2009) (prior to *Atkins*, evidence of intellectual disability was so damaging that prosecutor "had little incentive vigorously to contest" it); *Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010).[9] As the Louisiana Supreme Court explained shortly after *Atkins*,

> Because trial of this matter was conducted prior to *Atkins*, mental retardation as a factor exempting defendant from the death penalty was not an issue. Therefore, counsel's trial strategy may have been to shift the focus away

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[9] Although "future dangerousness" was not an explicit aggravating factor in Louisiana, it was common that the State would argue it to the jury – as the State did here. *See* JA 152a-53a ("[T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with.").

> from any diagnosis of mental retardation. As mentioned previously, the mere term "mental retardation" connotes negative images in some people.

Williams, 831 So. 2d at 856 n.31.

Atkins entirely changed the landscape. As the Louisiana Supreme Court observed in a case arising in a similar posture:

> The United States Supreme Court essentially altered the rules and altered a relevant fact after the trial. The State and the defense are both put in the impossible position of arguing whether a fact was established – i.e., whether the defendant is mentally retarded – when that fact was simply not an issue which a fact finder was called upon to decide. A fact that was marginally relevant when this case was tried (whether the defendant is mentally retarded) became a fact which could determine the sentence to be imposed after the trial. The State and defense gallantly attempt to argue from this record; however, their efforts must fail because the significance of the issue of mental retardation was drastically changed after the trial as a result of *Atkins*. The relevance of whether or not this defendant is mentally retarded has increased exponentially. Neither the State nor defense was required to anticipate this change.

State v. Dunn, 831 So. 2d 862, 886 (La. 2002).

Thus, to have demonstrated clinically significant "impairment . . . in adaptive skills" at his sentencing, Pet. App. 171a, Brumfield would have had to predict, well before either *Atkins* or *Williams* were decided, that he should call an expert to engage in what is "inherently an intensively factual inquiry," *State v. Williams*, 22 So. 3d 867, 887 (La. 2009), and "to make exceedingly fine distinctions," *Dunn*, 41 So. 3d at 469, required by the clinical standard. Because that was not part of the governing law in 1995, the absence of such testimony says nothing about whether *in fact* Brumfield is impaired in adaptive skills. *See Bies*, 556 U.S. at 829 (explaining that "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues"); *id.* at 834-35 (pre-*Atkins* finding of intellectual disability was not determinative where *Atkins* and the relevant state standard "had not then been decided" and it had not been shown that the defendant "suffered 'significant limitations in two or more adaptive skills'" (citation omitted)); *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1318 (11th Cir. 2013) ("The intervening decision in *Atkins* 'substantially altered the [parties'] incentive[s]' regarding evidence of mental retardation such that it would be a gross inequity to hold [petitioner] to an undeveloped, pre-*Atkins* record." (quoting *Bies*, 556 U.S. at 837) (last brackets added)).

This is not to say that, as a matter of law, a pre-*Atkins* record can never support a finding that a defendant is not entitled to an *Atkins* hearing. Having nothing to do with clinical intellectual disability, a

record could show, for example, that the defendant had earned a graduate degree, or was a university professor. Such a record might well support a determination that the defendant was not entitled to an *Atkins* hearing. But that is not this case. To the contrary, though there was no discussion in the pre-*Atkins* record of intellectual disability or "adaptive skills," the record was replete with "objective factors," *Williams*, 831 So. 2d at 856-57, that were strongly indicative of deficits in adaptive skills. All were ignored by the state court.

For example, in addition to Brumfield's low IQ score of 75, Dr. Bolter testified that Brumfield's "academic skills are very poor" and that he reads at a fourth-grade reading level at best. JA 128a. Dr. Bolter described this as a matter of "simple word recognition. That's not comprehension; that's just identifying [the words]." JA 128a. He testified that Brumfield's math and spelling are at a sixth-grade level. JA 128a. The record also showed that Brumfield was born weighing only 3.5 pounds. Dr. Bolter testified that this "places him in a risk of some form of potential neurological trauma .... It portends the possible problem." JA 130a-31a. He concluded that "this individual was in trouble many many many many years ago." JA 131a.

Similarly, the social worker, Dr. Guin, testified that Brumfield "was born with slower responses than normal babies." JA 76a. His teachers "knew something was wrong" with him by the third grade and repeatedly sought to get him into special education classes, "where he could be helped" and where he spent much of his schooling. JA 86a-87a. His school board referred him

to a mental health facility, which "questioned his intellectual functions" and whether he had a "learning disability related to some type of slowness in motor development." JA 89a. He had been transferred to fourteen or fifteen different schools by the time he was fourteen. JA 101a. He was admitted to six different out-of-home placements, including multiple residential hospitals, after the age of twelve. JA 90a-94a. At school, he did poorly even at recess and "could not function with a lot of chaos around him." JA 88a. He suffered from "impaired impulse control" and at both school and home, he needed someone to "help him function." JA 92a, 101a. Dr. Guin concluded that Brumfield had a "neurological problem" such that he "could not process information correctly." JA 101a.

None of these, on their own, definitively established deficits in adaptive skills or clinical intellectual disability. But all of them were consistent with adaptive skills deficits or clinical intellectual disability. *Cf. Atkins*, 536 U.S. at 318 (intellectually disabled persons "by definition . . . have diminished capacities to understand and process information"); DSM-IV-TR at 43 (people with mild intellectual disability "often are not distinguishable from children without Mental Retardation until an older age," and "can acquire academic skills up to approximately the sixth-grade level"). All of them were objective factors that put Brumfield's mental condition at issue. All of them were ignored by the state court because they were not packaged in *Atkins*' language of adaptive skills and clinical intellectual disability.

3. *Antisocial Behavior.* Finally, the state court noted, again without elaboration, Dr. Bolter's testimony that Brumfield had an "antisocial personality or sociopath, and explained it as someone with no conscience." Pet App. 171a. To the extent that this was a factual basis for the denial of Brumfield's *Atkins* claim, it was unreasonable. In fact, it was a non-sequitur. There was no evidence in the trial record that being antisocial, sociopathic, or lacking a conscience is inconsistent with clinical intellectual disability. To the contrary, in the very same paragraph where Dr. Bolter characterized Brumfield as antisocial and sociopathic, he also stated: "[Brumfield]'s on the low end of intelligence. His academic skills are very poor. He's reading at about the fourth grade level.... That's not even comprehension; that's just identifying." JA 128a. Nowhere did Dr. Bolter suggest that sociopathic behavior and intellectual disability are mutually exclusive.

To the contrary, there is unanimous agreement in the scientific literature that they are *not* mutually exclusive. Mental disorders, including conduct disorders such as antisocial personality disorder, and intellectual disability may coexist. *See* DSM-IV-TR at 47 ("The diagnostic criteria for mental retardation do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder"); AAIDD, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 12 (10th ed. 2007) ("AAIDD 10th ed. Users Guide") (recognizing the dual diagnosis of mental health disorders and

intellectual disability); *Handbook of Mental Illness in the Mentally Retarded* (Frank J. Menolascino & Jack A. Stark eds., 1984). Indeed, at Brumfield's federal habeas hearing, even the *State*'s expert agreed and found it uncontroversial that conduct disorders, such as antisocial personality disorder, may be coextensive with intellectual disability. Fed. Tr. Vol. V at 35-36; Fed. Tr. Vol. IV at 34; Fed. Tr. Vol. VI at 42-43, 79-80.

If anything, intellectually disabled individuals are *more* likely to develop such disorders. *See* DSM-IV-TR at 45 ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population"); AAIDD 10th ed. User's Guide at 15-16 ("In general, mental health disorders are *more prevalent* among individuals with MR/ID than the general population."); Irving Phillips & Nancy Williams, *Psychopathology and Mental Retardation: A Study of 100 Mentally Retarded Children*, 132 Am. J. Psychiatry 1265 (1975) (finding, in study of 100 children with mental retardation, that the largest categories of co-morbidity were behavioral disorders, followed closely by personality disorders).[10]

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[10] *See also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 142 (11th ed. 2010) ("[I]t has become the standard of practice to acknowledge that mental illness may occur more frequently in people with ID than the general population."); George W. Woods, et al., *Intellectual Disability and Comorbid Disorders*, *in* AAIDD, *The Death Penalty and Intellectual Disability* 279, 279 (Edward A. Polloway ed., 2015) ("More than 40% of people with intellectual disability . . . are also clinically diagnosed with another form of mental disorder").

Accordingly, to the extent the state court rejected Brumfield's *Atkins* claim based on its own view that conduct disorders and intellectual disability are mutually exclusive, that determination found no support in the record and was demonstrably wrong. *See Atkins*, 536 U.S. at 309 (holding that the petitioner was entitled to a hearing notwithstanding testimony at the penalty phase that he was "diagnosable as having antisocial personality disorder").

It was patently unreasonable to deny Brumfield even a hearing on his *Atkins* claim based solely on his pre-*Atkins* penalty phase record. The pre-*Atkins* record was in no way developed for the purpose of establishing the clinical criteria of Brumfield's intellectual disability. Yet it contained a plethora of objective factors that support such a diagnosis. As a result, the decision to deny Brumfield a hearing on his *Atkins* claim was based on an entirely unreasonable determination of the facts that were before the state court under § 2254(d)(2). *See Wiggins*, 539 U.S. at 528 (concluding that the state court's decision was based on an unreasonable determination of the facts where it made incorrect assumptions about whether certain social service records mentioned sexual abuse). The decision of the state court therefore posed no bar to the granting habeas relief in federal court.

II. The State Court's Failure To Assure Brumfield Access To Expert Assistance To Develop Evidence Of His Intellectual Disability Violated Clearly Established Federal Law As Determined By This Court.

The state court decision posed no bar to relief in federal court for a second, independent reason under § 2254(d)(1): namely, the state court's failure to assure Brumfield access to expert assistance in order to develop evidence for his claim of intellectual disability violated clearly established law determined by this Court.

Being intellectually disabled renders a person constitutionally ineligible to be executed by the state. In turn, it is beyond question that one cannot possibly prove the clinical criteria of intellectual disability without the assistance of an expert. Here, despite Brumfield's undisputed indigence, and despite his repeated assertions to the state court of its obligation to provide access to an expert, the court failed to do so. Pet. App. 181a. Exacerbating the error, the court denied Brumfield' claim for postconviction relief *before* addressing his request for assistance. Pet. App. 171a-72a, 181a. That deprived Brumfield of the opportunity to develop and make out his claim through other means, including possible *pro bono* sources, and thus effectively deprived him of an opportunity to be heard with respect to his intellectual disability and ineligibility for the death penalty.

This Court has articulated three circumstances under which a federal court may grant habeas relief consistent with § 2254(d)(1). "[A] federal habeas court

may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Furthermore, a state court's decision constitutes an unreasonable application of clearly established federal law when the state court "misapplie[s] a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Wiggins*, 539 U.S. at 520 (internal quotation marks omitted). Under this last prong, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. . . . The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

A. The State Court's Decision Was Contrary To, And An Unreasonable Application Of, *Ake v. Oklahoma*.

The state court's failure to provide Brumfield with access to an expert to develop his claim of intellectual disability was contrary to, and an unreasonable application of, the rule of law announced in *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, this Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the

defense." *Id.* at 83; *see also Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (holding that *Ake* requires a state to provide "the assistance of an independent psychiatrist"). *Ake* unquestionably mandated access to a clinical evaluation in Brumfield's circumstances.

1. *The Rule of* Ake. *Ake* was grounded on the principle that "fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." 470 U.S. at 77 (internal quotation marks omitted). Thus, in the case of an indigent defendant, the state must provide "the basic tools of an adequate defense" to "defendants who cannot afford to pay for them." *Id.* (internal quotation marks omitted); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984). This essential right flowed from the due process guarantee of "fundamental fairness," and "from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. at 76.

Ake instructed that a court should consider three factors when determining whether an expert must be provided for an indigent defendant. The first factor is the defendant's "private interest" that "will be affected by the action of the State." *Id.* at 77. The second is the "governmental interest that will be affected if the safeguard is to be provided." *Id.* The third factor is the "probable value" of the safeguard and "the risk of an erroneous deprivation of the affected interest" if it is not provided. *Id.*

Applying these factors, the Court found that the state was required to provide the defendant in *Ake* with access to a mental health expert. *Id.* at 78-83. The Court first observed that a defendant in a capital case has a "uniquely compelling" private interest because his "life [and] liberty" are "at risk." *Id.* at 78. Second, ensuring access to an expert advances the state's interest in providing robust access to justice, in maintaining the fairness of judicial proceedings, and in the state's "profound interest" in ensuring that the ultimate punishment of execution is not improperly imposed. *Id.* at 76-77, 83-84. These interests are not outweighed by the comparatively minor imposition on the state's fisc caused by providing this limited assistance to indigent defendants in capital cases. *Id.* at 78-79.

Most important to the Court's analysis was the final factor, which looks at the value of a mental health expert to the integrity of the judicial proceeding and the risk of error if one were not provided. *Id.* at 78-79. This Court recognized the "pivotal role that psychiatry has come to play in criminal proceedings" where the defendant's "mental condition [is] relevant to his criminal culpability and to the punishment he might suffer." *Id.* at 80. Mental health experts "gather facts . . . that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior." *Id.* at 80. Such experts ensure "a sensible and educated determination about the mental condition of the defendant." *Id.* at 81. By contrast, without the

assistance of a psychiatrist, the "risk of an inaccurate resolution" of the defendant's mental condition is "extremely high." *Id.* at 82.

The Court therefore held that where a defendant's sanity is "a significant factor," due process requires that the defendant be provided with funding for, or access to, a competent psychiatrist to help pursue his defense. *Id.* at 83.

The Court further held that its analysis "compels a similar conclusion in the context of a capital sentencing proceeding." The right of "access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation" extends to the penalty phase, in mitigating the state's evidence of future dangerousness. *Id.* at 83-84. "Without psychiatric assistance" in such circumstances, the defendant is prevented from offering a well-informed expert's view "and thereby loses a significant opportunity to raise in the jurors' minds questions about" the State's case for death. *Id.* at 84.

2. *The State Court Violated* Ake. The state court's failure to fund or otherwise provide Brumfield with access to an expert was both contrary to, and an unreasonable application of, the rule of *Ake*.

Application of *Ake*'s three factors compels the same analysis and outcome here as it did in *Ake*. Brumfield's "private interest in the accuracy of a criminal proceeding that places [his] life [and] liberty at risk is almost uniquely compelling." *Ake*, 470 U.S. at 78; *see also id.* at 87 (Burger, C.J., concurring). Likewise, Louisiana's interest here is indistinguishable from

Oklahoma's in *Ake*. Louisiana has a significant interest in ensuring that its intellectually disabled citizens have a meaningful opportunity to be heard in its courts, and a profound interest in avoiding the cruel and unusual execution of intellectually disabled Louisianans. Just like Oklahoma, Louisiana "may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* at 79. And, like Oklahoma, Louisiana has only a negligible interest in protecting its fisc by refusing to provide the means to obtain expert assistance to intellectually disabled defendants facing execution. *See id.* at 78-80 & nn. 4-5.[11]

Turning to the value of the assistance of a mental health expert and the risk of error if one is not provided, there is no disputing "the pivotal role" of mental health experts in proving intellectual disability in the criminal justice system. Indeed, it is effectively impossible to put on an *Atkins* case without an expert. Likewise, it was clear at the time of the state court's 2003 decision that proof of intellectual disability under *Atkins*, as implemented by Louisiana, was premised on

---

[11] Indeed, a decision in favor of Brumfield would result in no meaningful prospective effect on the state's fisc because Louisiana already provides funding for defendants who raise a claim of intellectual disability. *See* La. Admin. Code tit. 22, pt. 15, ch. 9, § 913(B), (C) (Nov. 2014), *available at* http://www.doa.louisiana.gov/osr/lac/22v01/22v01-13.doc ("The state public defender shall provide funds for the assistance of experts, including mitigation specialists, and extraordinary investigative services.").

clinical standards within the exclusive domain of psychiatric professionals. *See Atkins*, 536 U.S. at 308 n.3 (endorsing clinical standards developed in professional texts published by the APA and AAIDD); *id.* at 318; *Williams*, 831 So. 2d at 859 ("experts with the appropriate expertise to diagnose mental retardation shall be utilized"); *see also Hall*, 134 S. Ct. at 1993 (it is "unsurprising" that courts "consult and are informed by the work of medical experts in determining intellectual disability" because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" it).

Without expert "examination and testimony" on the issue of intellectual disability, *Ake*, 470 U.S. at 83, Brumfield's *Atkins* claim had no "chance of success," *id.* at 81 (quotation marks omitted), and there was an "extremely high" risk of "an inaccurate resolution," *id.* at 82. Given the essential nature of a mental health expert's examination and testimony in showing intellectual disability, as well as the unacceptable risk of error without such testing, access to such an expert was a "basic tool[]" of Brumfield's defense just as much, if not more so, than it was for the defendant in *Ake*. *See id.* at 77.

As in *Ake*, Brumfield's mental condition was a "significant factor" in addressing the issue before the court. *Id.* at 83. A defendant's mental status will always be a "significant factor" in litigating an *Atkins* claim – indeed, it is the *only* factor. *See Atkins*, 536 U.S. at 318. Moreover, the state court here certainly "was on notice" of Brumfield's assertion that he was ineligible for the death penalty because of his

intellectual disability. *Ake*, 470 U.S. at 86. Brumfield's *Atkins* claim was the first issue presented in his First Amended Petition For Postconviction Relief, JA 189a-205a, and the court recognized the issue of Brumfield's intellectual disability as "the biggest one we need to address." Pet App. 171a.

To the extent *Ake* requires a defendant to make a preliminary *factual* showing in order to obtain access to a mental health expert, Brumfield made that showing. *See supra* at 36-37. To be sure, Brumfield's pre-*Atkins* sentencing record did not conclusively establish his impairments in adaptive functioning. But requiring such conclusive proof would render meaningless the access to expert assistance mandated by *Ake*. The entire point of Brumfield's request for resources was that an expert was necessary to develop and present the requisite clinical evidence of Brumfield's intellectual disability. In other words, for the rule of *Ake* to have any meaning, a defendant must be able to satisfy the preliminary threshold required to obtain access to an expert *without* first having an expert's assistance.

That *Ake* mandated access to an expert in this case is made even more clear by the Court's observation that its reasoning not only required state-assisted access to a mental health expert for establishing competency at trial, but "compel[ed] a similar conclusion in the context of a capital sentencing" for preparing mitigation evidence in response to the state's claim of future dangerousness. 470 U.S. at 83. If "the probable value" of the assistance of a mental health expert was sufficient in the context of enabling the

defendant to rebut an aggravating factor which, at best, would decrease the odds of receiving the death penalty, it necessarily would be so where, as here, the defendant is attempting to demonstrate his categorical ineligibility.

It is immaterial that Brumfield's *Atkins* claim was litigated at postconviction, as opposed to at trial or sentencing. Because Brumfield was convicted and sentenced prior to this Court's decision in *Atkins*, postconviction necessarily was his first opportunity to argue that he is intellectually disabled under *Atkins*' retroactively applicable right.[12]

Brumfield's interest, the State's interest, and the value to the specific judicial process of expert assistance are identical to *Ake*, and the factual contexts materially indistinguishable.

Finally, Louisiana exercised its discretion "on how to implement" *Ake* by permitting defendants, including those on postconviction, to request that resources be provided by the Court.[13] Brumfield followed that

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[12] *See Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012) (holding that an *Atkins* determination in such a situation would be "'postconviction' only in the strict chronological sense: *Atkins* was handed down in 2002, after [petitioner] had been convicted . . . . Of far greater importance is that his *Atkins* [hearing] was 'the first designated proceeding' at which he could raise a claim of mental retardation" (citation omitted)); *see also In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (observing unanimity among the circuits that there is "no question" that *Atkins* announced a retroactive rule).

[13] *See, e.g., State ex rel. Deboue v. Whitley*, 592 So. 2d 1287, 1287 (La. 1992) (holding that Louisiana courts have a "duty" to award

process. He expressly asserted his right to funding in the First Amended Petition for Postconviction Relief and requested that the court not proceed until such funding was provided. JA 207a. That funding never came. Nor did the court appoint an expert of its own. The State thus failed to provide *any* manner of assurance of expert assistance to this indigent capital defendant seeking to prove his intellectual disability.

For these reasons, the state court's decision was both contrary to, and an unreasonable application of, the rule of *Ake*. Accordingly, § 2254(d)(1) imposed no limitation on the federal district court's authority to grant Brumfield habeas relief.

"the funds necessary" to hire experts so that a postconviction petitioner can "present his claim fairly" (citing *Ake*, 470 U.S. 68)); *Copeland v. Smith*, 614 So. 2d 1245, 1245 (La. 1993) (recognizing that a postconviction petitioner obtains expert assistance by requesting that the court "order payment by the appropriate office or entity" (citing *Deboue*, 592 So. 2d 1287)); *State v. Craig*, 637 So. 2d 437, 446 (La. 1994) ("[W]hen an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the State ought to supply the funds." (quotation marks omitted)), *superseded by statute on other grounds as recognized by State v. Citizen*, 898 So. 2d 325 (La. 2005); *see also State v. Reeves*, 11 So. 3d 1031, 1044 (La. 2009) ("[A]n indigent defendant must also have a fair opportunity to present his defense. This often requires the assistance of expert witnesses. When a defendant is indigent, he must obtain funding to pay for this expert assistance." (citing *Ake*, 470 U.S. at 77)).

B. The State Court's Adjudication Denied Petitioner A Meaningful Opportunity To Be Heard In Violation Of The Rule Of *Ford v. Wainwright*.

The state court's refusal to afford Brumfield the means of developing expert testimony relevant to his intellectual disability also constituted an unreasonable application of *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* plurality recognized that,

> consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity . . . is necessarily inadequate. [T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.

Ford, 477 U.S. at 414 (internal quotation marks omitted). In turn, Justice Powell's controlling concurrence held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard'" on his claim that he is ineligible for the death penalty due to mental infirmity. 477 U.S. at 424 (Powell, J., concurring) (alteration in original).

As this Court observed in *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Ford* established that "[o]nce a

prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Id.* at 949 (quoting *Ford*, 477 U.S. at 426, 424). The *Panetti* Court held that the state court there had failed to provide this basic element of due process. Notwithstanding the petitioner's substantial threshold showing of incompetency, the court resolved his claim without a hearing based on a process that "invite[d] arbitrariness and error," *id.* at 951 (quoting *Ford*, 447 U.S. at 424), and denied the petitioner "an adequate opportunity to submit expert evidence," *id.* at 951-52.

The state court here violated the clearly established law of *Ford* for the same reasons. As described above, there can be no doubt that Brumfield made "a substantial threshold showing" of intellectual disability. *See supra* at 36-37. Notwithstanding that showing, the state court, as in *Ford* and *Panetti*, based its decision regarding Brumfield's eligibility for the death penalty on an unreliable record that "'[i]nvite[d] arbitrariness and error.'" *Panetti*, 551 U.S. at 951 (quoting *Ford*, 447 U.S. at 424). The state postconviction court based its decision regarding Brumfield's intellectual disability on the expert testimony from Brumfield's pre-*Atkins* sentencing record – testimony that was provided years before *Atkins* was decided and did not address the clinical standards that governed Brumfield's intellectual disability. The decision to rely on that record out of context was, if anything, *more* arbitrary than relying on the records built by state- and court-appointed

experts in *Ford* and *Panetti*, which at least were developed for the relevant purpose. *See Ford*, 477 U.S. at 424; *Panetti*, 551 U.S. at 949.

Furthermore, as in *Panetti*, the state court denied Brumfield an adequate opportunity to submit evidence by virtue of the unfair sequence in which it rejected his requests for funding and his claim of intellectual disability. As the Court observed in *Panetti*, the state court in that case violated *Ford* by rejecting the petitioner's claim that he was mentally ill *before* ruling on his pending motions for expert funding. 551 U.S. at 951-52. As the Court explained,

> [h]ad the court advised counsel it would resolve the case without first ruling on petitioner's motions and without holding a competency hearing, petitioner's counsel might have managed to procure the assistance of experts, as he had been able to do on a *pro bono* basis the day before petitioner's previously scheduled execution. It was, in any event, reasonable for counsel to refrain from procuring and submitting expert psychiatric evidence while waiting for the court to rule on the timely filed motions, all in reliance on the court's assurances.

Id. at 952.

That is precisely what happened to Brumfield here. He asserted his entitlement to expert funding and specifically argued that it would be "premature . . . to address [his] claims" before resolving his entitlement to expert assistance. JA 207a. As in *Panetti*, it was reasonable for Brumfield to rely on his state law

entitlement to expert assistance. As in *Panetti*, if the state postconviction court would have denied Brumfield's request for funding before denying him a hearing and dismissing his petition, he could have attempted to secure appropriate expert assistance on a *pro bono* basis. Instead, the state court gave Brumfield no notice that he should look elsewhere for assistance and instead "simply ended the matter" by denying his *Atkins* claim while he was reasonably waiting to obtain a ruling on funding from the court. *Panetti*, 551 U.S. at 952. These procedural deficiencies violated the principles articulated in *Ford* and "failed to provide petitioner with a constitutionally adequate opportunity to be heard" on his intellectual disability. *Id.*

Lastly, the state court's arbitrary decision is not justified by Louisiana's "substantial leeway to determine what process balances the various interests at stake." *Ford*, 447 U.S. at 427. As in *Panetti*, the state court failed to follow the procedural framework that the State had put in place by disregarding Brumfield's entitlement to funding and denying it only after rejecting Brumfield's claim for postconviction relief based on his intellectual disability. *Panetti*, 551 U.S. at 950-51 ("[A] violation of the procedural framework [the state] has mandated . . . undermines any reliance the State might now place on Justice Powell's assertion that 'the States should have substantial leeway to determine what process best balances the various interests at stake'" (quoting *Ford*, 447 U.S. at 427)). As discussed above, Louisiana law was clear at the time of Brumfield's postconviction petition that the state court had a "constitutional duty

to determine whether [Brumfield was] entitled to" fees for experts. *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287, 1287 (La. 1992); *Copeland v. Smith*, 614 So. 2d 1245, 1245 (La. 1993) (explaining that postconviction courts are required to hold an evidentiary hearing to determine whether the petitioner is entitled to funds and, if so, "fix them in the proper amount"). The state court's treatment of Brumfield's funding requests in this case was an affront to, not an application of, Louisiana's exercise of its discretion in implementing *Ake*.

Because the state court's decision was based on an unreasonable application of *Ford*, it was not deserving of AEDPA deference from the federal district court under § 2254(d)(1).

C. The State Court's Decision Violated *Atkins v. Virginia*.

Finally, the state court's decision was contrary to, and an unreasonable application of, *Atkins* itself. Although this Court left the implementation of *Atkins* to the states, it left no doubt that executing intellectually disabled persons is prohibited by the Eighth Amendment. *Atkins*, 536 U.S. at 321. As discussed above, *Atkins* also endorsed a clinical definition of intellectual disability that had been developed over time by the scientific community and was the domain of properly trained experts. *Id.* at 308 n.3, 309 n.5. In turn, Louisiana adopted the same clinical definition endorsed in *Atkins* and instructed that its application should be "guided by experts

capable of diagnosing mental retardation." *Williams*, 831 So. 2d at 858.

Regardless of the adequacy of Louisiana's procedures in theory, their application in this case cannot be squared with *Atkins*' most fundamental principle that the Constitution prohibits the execution of intellectually disabled persons. Intellectually disabled persons *cannot* demonstrate their ineligibility for the death penalty without the assistance of a qualified expert. It follows that a state court applying *Atkins* utterly fails to effectuate its most basic command where, as here, it fails to fund or otherwise assure expert assistance for an indigent defendant at his first opportunity to argue that his intellectual disability renders him ineligible for the death penalty. Without relevant expert testimony in the record before it, the state court's application of the clinical definition of intellectual disability was inherently untrustworthy and cannot be presumed to adequately protect the constitutional guarantee of ineligibility announced in *Atkins*. *See Atkins*, 536 U.S. at 309, 321 (holding that it was necessary to hold further proceedings to evaluate petitioner's intellectual disability, notwithstanding that he had been provided a penalty phase at which there was evidence that he was "of 'average intelligence at least'" and he was "diagnosable as having antisocial personality disorder"). The state court's decision is thus not deserving of deference under § 2254(d)(1).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Petitioner asked the Court to resolve the following questions:

I. Whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of the facts under 28 U.S.C. §2254(d)(2).

II. Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his intellectual disability has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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STATEMENT

Petitioner Kevan Brumfield was sentenced to death for murdering an off-duty police officer in Baton Rouge, Louisiana, during the course of a premeditated armed robbery he orchestrated. The Fifth Circuit, reversing the district court, denied his petition for federal habeas corpus relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This Court should affirm. Brumfield mischaracterizes the record, ignores his failure to exhaust the constitutional claims he advances, and inappropriately seeks to extend this Court's decisions to encompass novel arguments. The state court reasonably determined the facts based on the record and did not contravene any clearly established law. Brumfield's death sentence is lawful under *Atkins v. Virginia*, 536 U.S. 304 (2002).

A. The Crime

On January 7, 1993, at approximately 12:10 am, Corporal Betty Smothers, a 36-year-old off-duty police officer, escorted Kimen Lee, the assistant manager of a Piggly Wiggly grocery store in Baton Rouge, Louisiana, to a bank across town to make the store's nightly deposit. When the police car pulled up to the bank and backed into the night depository lane, Ms. Lee rolled down the passenger window to make the deposit. In tandem, two shooters who had been lying in wait quickly converged on opposite sides of the car and began shooting rapid-fire at Corporal Smothers and Ms. Lee. Corporal Smothers was struck in the hail of gunfire, and she slumped to the side motionless. Ms. Lee reached over Corporal Smothers's body and took control of the vehicle. Although she too had

been shot, she managed to drive the car half a mile to a convenience store.

Police and emergency medical services responded to the scene. Corporal Smothers had sustained five gunshot wounds to her head, back, shoulder, and forearm. She could not breathe on her own and had no pulse or blood pressure. She was pronounced dead at 12:42 am. Ms. Lee survived, despite having been shot four times in the crossfire of the two gunmen.

Three days later, Eddie Paul called the police and told them Brumfield had murdered Corporal Smothers. Brumfield initially denied involvement, claiming he was with his brother when the crime occurred. But once informed that his brother had not corroborated his alibi, Brumfield gave a videotaped statement admitting his involvement. Yet, Brumfield attempted to minimize his culpability by claiming he was the getaway driver while two others, West Paul and Henri Broadway, fired the shots that killed Corporal Smothers and wounded Ms. Lee.

Upon apprehension, Paul and Broadway each identified Brumfield as Corporal Smothers's shooter. After the police informed Brumfield of their statements, he gave a second videotaped interview in which he admitted to shooting her. Brumfield's confession demonstrated the attempted armed robbery that resulted in Corporal Smothers's death had been premeditated. Brumfield described how he had been "scoping things out" in the preceding days and knew a Piggly Wiggly employee protected by a police officer made deposits every night at that time. He admitted he arrived at the bank before the nightly deposit and hid in

the bushes waiting for the police car to arrive. He further admitted that he had recently procured the car and two handguns to use in the robbery and disposed of them afterward. He apologized for killing Corporal Smothers.

B. The State Trial

The State charged Brumfield with first-degree murder. Before trial, Brumfield was granted state funding for investigation, mitigation, and examination by psychologists. Through these funds, Brumfield obtained his educational and medical records, interviewed potential witnesses, and hired a sociologist, Dr. Cecile Guin, and two neuropsychologists, Dr. Brian Jordan and Dr. John Bolter, to examine him. Dr. Guin produced a thorough social history of Brumfield; Dr. Jordan and Dr. Bolter each produced comprehensive neuropsychological reports.

The evidence presented against Brumfield at trial was overwhelming. In addition to his taped confessions, the jury heard testimony that a few days before the murder Brumfield told his pregnant girlfriend he would give her money before his anticipated incarceration set to begin January 13, 1993;[1] that Brumfield had been seen in the Piggly Wiggly with Henri Broadway, who Ms. Lee identified as one of the shooters, an hour before the crime; that Brumfield asked his girlfriend to lie about his whereabouts during the time when the murder occurred;

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1. On October 13, 1992, Brumfield pleaded guilty to attempted possession of cocaine and felony theft of a gun; he was scheduled to be sentenced on January 13, 1993, six days after Corporal Smothers was murdered. Transcript of Sentencing Hearing ("Sent.") 15-16 (July 3, 1995).

and that Brumfield told Eddie Paul on the morning after the murder that he had killed someone but the crime had been "a waste of time" because he made no money. The jury convicted Brumfield of first-degree murder.

The State sought the death penalty. It called several witnesses at the sentencing hearing. The witnesses testified to Brumfield's crime spree in the weeks leading up to Corporal Smothers's murder.

Anthony Miller testified that on December 25, 1992, thirteen days before Corporal Smothers was murdered, Brumfield offered to give him a ride from a club back to Baton Rouge. While in transit, Brumfield ordered Miller out of the car at gunpoint, robbed him of a gold chain, a jacket, and 80 dollars, put a gun to his head, and pulled the trigger; Mr. Miller only survived because Brumfield's gun misfired. Sent. 18-20.

Edna Perry and her daughter, Trina Perkins, testified that on January 2, 1993, five days before the murder, Brumfield robbed them at gunpoint while they were walking along North Boulevard in Baton Rouge. After having ridden in a car past Perry and Perkins, Brumfield exited the car on the same side of the street and acted as if he had a foot injury. As Perry and Perkins walked by, Perry pulled a knife out of her purse fearing that "something was going to happen right then." Brumfield let them walk by but then returned to the car and followed them. As he drove up along side them, he put a sawed-off shotgun in Ms. Perry's face and said "hand it [her purse] over, bitch." Ms. Perry asked if she could keep pictures of her deceased son that were in her purse. Brumfield responded, "bitch, you dead," and drove away. Sent. 31-32, 43-44.

The State also called as witnesses Corporal Smothers's mother and her two sons, Warrick Dunn and Derrick Green. Each testified as to the impact of her death on the family and their difficulty living without her. Sent. 53-57, 59-60.

Brumfield's parents, brother, and fourth grade teacher testified on his behalf. They testified that through first and second grade he "was a straight 'A' student," but that problems started in the third grade when Brumfield's parents separated and an abusive stepfather entered the picture. While Brumfield was at times "a very affectionate, very loving child" who "loved to make people laugh," he also could be "completely disruptive" and "distracting [to] the class." Brumfield was diagnosed with attention deficit disorder. Sent. 66-67.

Brumfield also called Dr. Cecile Guin, a professor at Louisiana State University's School of Social Work. At Brumfield's request, Dr. Guin had conducted a "social history," in which she tried to "find every single source of information" about Brumfield's life. To that end, Dr. Guin interviewed approximately thirty people, including Brumfield, his teachers, family, and officials at state agencies. She also reviewed "every single psychological report that was ever done on [Brumfield]." Sent. 112-13, 141.

Dr. Guin found that, although Brumfield had a low birth weight of 3.5 pounds, he was born "just about full term" and had a birth that was "normal in every other way." Sent. 114; Report of Dr. Cecile Guin ("Guin Report") 1-2. Brumfield's early life was "probably the happiest time of his life," and Dr. Guin found no "medical

records or anything that would indicate there was any trauma from after the time that he was born until age four or five." Sent. 117. Brumfield "did pretty well in the first and second grade," but by third grade his behavior had deteriorated. The timing corresponded with the breakup of the family and abuse from a stepfather. Sent. 118-19. During his childhood, Brumfield had multiple psychological evaluations, which revealed that he had a "behavior disorder" and "attention deficit disorder." Brumfield had maintained a job at a restaurant for three months, but quit because drug dealing was more profitable. Sent. 138. At the time of his sentencing, Brumfield had five children with three different women. Sent. 139.

Last, Brumfield called Dr. John Bolter, a well-regarded clinical neuropsychologist at the NeuroMedical Center in Baton Rouge, Louisiana, to "testify as an expert in the field of neuropsychology." Sent. 145. Brumfield had asked Dr. Bolter to perform "a neuropsychological evaluation to determine to what extent [Brumfield] may be manifesting neurocognitive deficits associated with organic brain impairment." Report of Dr. John F. Bolter ("Bolter Report") 1. Dr. Bolter thus "administered a comprehensive battery of neuropsychological measures directed to assessing his level of intelligence, basic achievement skills, psychomotor functions, psychosensory and perceptual skills in visual, auditory and tactile domains, mental flexibility, attention and concentration, receptive and expressive language functions, learning and memory and complex problem solving or abstraction." *Id.* 6. Specifically, Dr. Bolter administered the following tests:

- National Adult Achievement Reading Test (NAART)

- Wechsler Adult Intelligence Scale-Revised (WAIS-R)
- Wide Range Achievement Test-Revision 3 (WRAT-3)
- Lateral Dominance Test
- Mechanical Grip-Strength Test
- Name Writing Speed Test
- Finger Tapping Test
- Grooved Pegboard Test
- Luria Motor Skill Assessment
- Reitan-Klove Sensory-Perceptual Examination
- Seashore Rhythm Test
- Speech Sounds Perception Test
- Benton Facial Recognition Test
- Hooper Visual Organization Test
- Trail Making Test
- Stroop Neuropsychological Screening Test
- Intermediate Visual and Auditory Continuous Performance Test (IVA)

- Reitan-Indiana Aphasia Screening Test
- Clock Drawing Test
- Benton Controlled Oral Word Association Test
- Benton Visual Naming Test
- California Verbal Learning Test
- Wechsler Memory Scale-Revised (Logical Memory I and II, and Visual Reproductions I and II portions)
- Halstead Category Test

Id.

After reviewing the results, Dr. Bolter found that Brumfield's motor functions and auditory functions were intact, he had normal language articulation, and he had an IQ score of 75, which indicated he was functioning within the borderline range of general intelligence. Dr. Bolter noted that Dr. Brian Jordan had "rated [Brumfield's] intelligence just a little higher."[2] Sent. 149. Dr. Bolter agreed with Dr. Jordan's assessment that Brumfield had attention deficit disorder and an antisocial personality. Sent. 149. Dr. Bolter further found that Brumfield's

2. After Dr. Jordan produced an expert report, the defense neither called him as a witness nor disclosed his report to the State. The State learned of and obtained a copy because Drs. Guin and Bolter both considered it in producing their respective reports. Drs. Guin and Bolter both referenced Dr. Jordan's report in their testimony; the State read portions into the record. Sent. 135-140, 149.

"problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." Bolter Report 9.

Dr. Bolter's report summarized his findings:

> Based on the present evaluation, Mr. Brumfield appears to be functioning within the Borderline range of general intelligence and within the Low Average to Borderline range for basic academic skills. Except for problems with complex attention associated difficulty in acquisition secondary to that problem, he appears to be normal from a neurocognitive perspective. He also has a normal capacity to learn and acquire information when given the opportunity for repetition .... His problem solving and reasoning skills are also adequate and he is not showing lateralizing or focal deficits in neuropsychological functioning that would otherwise be indicative of an organic mental disorder.

Id. 10.

The jury unanimously recommended a sentence of death. The Louisiana Supreme Court affirmed his conviction and sentence. Petition Appendix ("Pet.App.") 208a. This Court denied Brumfield's petition for a writ of certiorari. *Id.* 184a.

C. The State Post-Conviction Proceeding

On March 25, 2000, Brumfield filed an application for post-conviction relief with the state trial court. The application alleged, among other things, he was ineligible for execution due to insanity, notwithstanding the fact that the opinions of Drs. Guin, Jordan, and Bolter, and the historical data, which included six psychological, learning, and IQ assessments, did not support the theory. Brumfield also filed a motion to allow him to "amend and supplement his Petition within 120 days (or such later fixed date as the court may hereafter set)." Joint Appendix ("JA") 175a-76a. The motion was granted.

More than a year later, on May 9, 2001, Brumfield filed a second motion asking for a continuance, which was granted. On September 5, 2001, Brumfield filed a third motion for a continuance, which was granted. On November 19, 2002, Brumfield filed a fourth motion for continuance and to amend his application in light of *Atkins*, which was granted. None of these motions sought state-appointed expert assistance.

On June 16, 2003, Brumfield filed an amended post-conviction application. It alleged that under *Atkins* and *State v. Williams*, 831 So. 2d 835 (La. 2002), the state court was "required to hold an evidentiary hearing and, following that hearing, to find that Brumfield is mentally retarded." JA 202a.[3] Brumfield did not submit additional

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3. With the exception of quotations from the record or prior case law, this brief uses the term "intellectual disability" to describe the "identical phenomenon" historically referred to as "mental retardation." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

evidence to support the *Atkins* claim. He relied on selected evidence that had been presented during his sentencing proceedings. Pet.App. 122a n.6.

Brumfield also asserted cumulative error, ineffective assistance of counsel, jury misconduct, and lack of impartiality. JA 209a. At the end, under the title "Other Claims and Issues," Brumfield stated the following:

> Under La. R.S. 15:149.1 and otherwise, Brumfield is entitled to funds for his counsel to investigate his claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts .... However, the Legislature has not yet allocated any amounts to fund this statutory mandate. Thus, until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.
>
> Because undersigned counsel have not been provided funds for their representation, for retaining any experts, or otherwise and have not had adequate resources to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside, petitioner will separately seek funding from [] this Court and request additional time to amend this petition once funding issues have been resolved.

JA 207a.

Thus, although Brumfield asserted he was entitled to funding under state law, specifically La. R.S. 15:149.1,[4] he never claimed entitlement to State-funded expert assistance under federal law. In addition, despite asserting he intended to "separately seek funding from [the] Court," JA 207a; JA 244a ("Brumfield will, prior to the hearing on procedural bars, be submitting a separate motion for funding in this matter."), Brumfield never filed any such funding motion.

On October 23, 2003, the state court held a hearing on Brumfield's amended application in accordance with *Williams*.[5] In that decision, the Louisiana Supreme Court noted that *Atkins* "left to the states the task of developing appropriate ways to determine which offenders will be spared the death penalty because of mental retardation." *Williams*, 831 So. 2d at 853. The decision set forth substantive and procedural rules for handling such claims. Substantively, the court explained "that a diagnosis of mental retardation has three distinct

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4. In 1999, the Louisiana legislature passed La. R.S. 15:149.1, requiring state trial courts "after imposition of the sentence of death" of an indigent defendant to appoint the Louisiana Indigent Defense Assistance Board "to represent the defendant on direct appeal and in any state post-conviction proceedings, if appropriate." But Brumfield's conviction became final before the statute's enactment, and he already was being represented by *pro bono* counsel on post-conviction review. Brumfield has never articulated his legal basis for believing that La. R.S. 15:149.1 entitled him to state-appointed expert assistance. JA 207a, 259a-60a, Petitioner's Brief ("Pet. Br.") 10-12, 53-54.

5. Brumfield implies he was unaware that his claims would be resolved at this hearing, Pet. Br. 11, 27, but the record belies any such implication, Pet.App. 170a-71a.

components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage, *i.e.*, by the age of 22 years," although "*Atkins* also subscribed to the diagnostic criteria that the onset of mental retardation must occur before the age of 18 years." *Id.* at 854.[6]

Procedurally, the court explained "that not everyone faced with a death penalty sentence will automatically be entitled to a post-*Atkins* hearing. It will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. A defendant's entitlement to a post-*Atkins* hearing will be made on a case-by-case basis." *Id.* at 857. The court then instructed "trial courts to treat the issue procedurally as they would treat pre-trial competency hearings, for which statutory criteria already exist in Louisiana." *Id.* at 858. "There is no automatic right to a hearing on the issue of mental retardation, whether the hearing is sought pre-trial, while the case is on appeal, or as post-conviction relief." *Id.* at n.33.

The first step, therefore, was for the state court to decide whether Brumfield made the threshold showing of intellectual disability triggering his right to an evidentiary hearing. The court, after reviewing the record, found that Brumfield had not made the requisite showing. The judge explained his reasons in open court:

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6. Louisiana later adopted a statutory definition of intellectual disability, La. C. Crim. P. art. 905.5.1(H) (2014), but that definition is inapplicable to this case, Pet. Br. 26 n.7.

> [T]here are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guin's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report.
>
> Dr. Bolter in particular found he had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Pet.App. 171-72a.

The court also rejected Brumfield's other claims for post-conviction relief. In particular, the court rejected the funding claim because it did not "fit[] within the grounds under [Louisiana Code of Criminal Procedure Article] 930.3," and was "not set out with enough particularity." Pet.App. 181a.

On January 8, 2004, Brumfield filed an application for a supervisory writ with the Louisiana Supreme Court. JA 245a-60a. Brumfield again argued *Atkins* and *Williams* entitled him to an evidentiary hearing and, ultimately, a finding of intellectual disability, JA 254a. As to funding, he repeated verbatim the statement from his amended post-conviction application. JA 254a, 259a-60a. Thus, Brumfield again claimed that state law—not federal law—entitled him to funding. The application was denied. Pet. App. 168a. Brumfield did not file a petition for certiorari with this Court.

D. Federal Post-Conviction Proceeding

1. The District Court

On November 4, 2004, Brumfield filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Louisiana. District Court Record, Docket Entry ("Doc.") No. 1. In that petition, he asserted nearly identical rights to an evidentiary hearing and funding. Doc. 1. The only difference was that, as to funding, Brumfield claimed his entitlement arose "under [the] United States Constitution or otherwise" instead of "under La. R.S. 15:149.1 or otherwise." *Compare* Doc. 1 at 37, *with* JA 207a. In its Answer, the State noted that although "it appears that petitioner has exhausted his

state judicial remedies with respect to all claims he has presented in the instant petition [and] [t]he application for federal habeas corpus relief is timely," the petition should be dismissed because "adequate and independent state procedural bars foreclose[d] relief" and "the state court rulings on the merits [were] entitled to a presumption of correctness." Doc. 11 at 8.

The district court appointed counsel; the Federal Public Defender Board provided expert funding. The matter was then assigned to a magistrate judge. On November 1, 2007, Brumfield filed an amended petition that incorporated his expert's findings. Doc. 30. Brumfield asked the magistrate judge to consider his new evidence because he had been unable to obtain funding under La. Rev. Stat. §15:149.1, which in turn prevented him from "develop[ing] and uncover[ing] facts supporting his claims while he was in state post conviction proceedings." Doc. 30 at 1-6; *see supra* n.4. The State opposed the introduction of new evidence, arguing, among other things, that the new evidence would make his *Atkins* claim unexhausted. Doc. 36 at 6-18.

On April 15, 2008, the magistrate judge issued a report and recommendation. Pet.App. 101a-67a. The magistrate judge found the state court had properly concluded that the evidence in the record did not justify holding an evidentiary hearing under *Atkins*. In the magistrate judge's view, the record evidence showed that Brumfield was not intellectually disabled because he had an IQ of 75, there was no evidence of impairment in adaptive skills, and all evidence suggested that before the age of 18 Brumfield had attention deficit disorder and antisocial behavior. *Id.* 127a-29a.

The magistrate judge nevertheless considered the new evidence in her analysis of Brumfield's *Atkins* claim. The magistrate judge concluded she need not decide whether the new evidence fundamentally altered the *Atkins* claim (thus rendering it unexhausted) because even assuming it did, Brumfield demonstrated "cause" and "prejudice." *Id.* 122a. The "cause" was the state court's failure to provide Brumfield funding, and the "prejudice" was a Louisiana statute of limitations bar. *Id.* 143a.

After reviewing the new evidence, the magistrate judge concluded that Brumfield had established a *prima facie* case of intellectual disability under *Atkins* and was entitled to an evidentiary hearing. Pet.App. 143a-44a. On June 30, 2008, the district court adopted the magistrate judge's report and recommendation, Pet.App. 99a-100a, and scheduled an evidentiary hearing for the summer of 2010.

At the evidentiary hearing, Brumfield called three expert witnesses. Dr. Stephen Greenspan, a psychiatrist at the University of Colorado Medical School, testified generally as to the standard for evaluating intellectual disability; he never interviewed Brumfield and did not prepare a report. Federal Transcript Volume ("Vol.") I, pg. 5, 13. Dr. Ricardo Weinstein, a psychologist without a clinical practice and a frequent consultant to attorneys in death penalty cases, testified that Brumfield had "mild mental retardation." Vol. I, pg. 60, 229-31. He reached this conclusion after: (1) giving Brumfield a new IQ test, which showed an IQ of 72; (2) adjusting Brumfield's prior IQ scores downward based on the "Flynn Effect";[7] (3) relying

7. The "Flynn Effect" is "an adjustment used in interpreting standardized tests to account for the fact that IQ scores have been

on his low birth rate and circumstances of his childhood; and (4) witnessing Brumfield have problems performing certain tasks, such as writing a letter. Vol. II, pg. 42-51, 71-73, 89. Dr. Weinstein acknowledged that he was the first person to diagnose Brumfield as intellectually disabled. *Id.* 108. Brumfield also called Dr. Victoria Swanson, a psychologist from Lafayette, Louisiana. Without ever having interviewed Brumfield, Dr. Swanson produced a report that parroted Dr. Weinstein's conclusion that he had "mild mental retardation." Vol. VI, pg. 31-130.

The State called three expert witnesses. Dr. Donald G. Hoppe, a clinical psychologist from Baton Rouge, Louisiana, testified he had examined Brumfield and determined that he was not intellectually disabled. Dr. Hoppe found that Brumfield had a full-scale IQ of 70 and a functional IQ of 75, had normal adaptive skills, and had not shown any instance of intellectual disability before the age of 18. Vol. IV, pg. 23-25; Report of Donald G. Hoppe ("Hoppe Report") 3-12. He found two factors particularly relevant. First, Dr. Hoppe noted that "[p]rior to age 18, [Brumfield] was seen by at least six psychologists and a psychiatrist," and at trial "was evaluated by both Dr. Jordan and Dr. Bolter." Hoppe Report 9. Dr. Hoppe found it compelling that there was "not a single mention of mental retardation in any of the extensive records available on [Brumfield] from his developmental years, in spite of numerous educational and psychological evaluations."

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increasing from one generation to the next and calls for a reduction of approximately 0.33 points per year for each year between the time the test was administered and the test was normed." *Harris v. Thaler*, 464 F. App'x 301, 307 (5th Cir. 2012). The Fifth Circuit "does not recognize the Flynn Effect as a valid scientific theory." *Id.* at 308.

Id. That was especially compelling given that schools in that area had frequently over-diagnosed young African Americans with behavior problems as intellectually disabled. Vol. IV, pp. 116-17. Dr. Hoppe also found that Brumfield's criminal behavior was "the best example of how good his adaptive skills as an adult have been." Hoppe Report 11. "In planning, carrying out, and then attempting to evade arrest for several crimes," Brumfield "displayed well-developed skills in communication, time management, task organization, problem solving, transportation, self-preservation, and self-direction." *Id.*

Next, Dr. Robert Blanche, a psychiatrist from Baton Rouge, Louisiana, testified he had examined Brumfield and reached the same conclusion. He also found it significant there was "not one assessment that diagnosed mental retardation or an IQ below 70 prior to the age of 18, despite repeated efforts in testing him," and that "[a]ll of the intellectual assessments done prior to the age of 18 indicate that [Brumfield's] IQ consistently fell in the 70-85 range (low normal to normal range)." Report of Dr. Robert V. Blanche ("Blanche Report") 6. Dr. Blanche also found this significant because "if there was one thing that [the school system] did well, it was to identify the children who were mentally retarded." *Id.* Dr. Blanche identified numerous capabilities indicating Brumfield had normal adaptive functioning, including that he could plan and direct complicated actions, as shown by his previous experience as a drug dealer and the robbery and murder of Corporal Smothers. *Id.* 6-10. Dr. Blanche's expert opinion was that this is a "classic case of conduct disorder," not intellectual disability. Vol. IV, pg. 194.

The State then called Dr. Bolter, Brumfield's trial witness, to testify to the results of his prior examination. Dr. Bolter testified that he "didn't see any clear evidence of organic brain dysfunction" and instead found that Brumfield had "an attention deficit hyperactivity disorder, ... nonspecific learning difficulties, ... borderline intellectual functioning, and ... an antisocial personality." Vol. VII, pg. 32. Dr. Bolter never suspected Brumfield was intellectually disabled. *Id.* 36. Had he, Dr. Bolter, "absolutely" would have conducted further testing. *Id.*

Last, the State called lay witnesses to testify as to their interactions with Brumfield. Officer Jerry Callahan, who witnessed Brumfield's confessions, explained that Brumfield "communicated easily," "never had a problem understanding [the officer's] questions," and had no "problem in making himself understood." Vol. III, pg. 146-49. Warrick Dunn, the son of Corporal Smothers, testified he had visited Brumfield in prison and "had a conversation like two adults.... I expressed myself and he was able to express himself.... He even talked about his own daughter, things that she was going through, getting ready for college." Vol. VII, pg. 59. Dunn noted his surprise that Brumfield had closely followed his football career, knowing details like how many yards Dunn needed to reach 10,000 for his career and how many times Dunn had been selected to the NFL Pro Bowl. The evidentiary hearing concluded on August 4, 2010.

Following the hearing's conclusion, this Court issued *Harrington v. Richter*, 131 S. Ct. 770 (2011) and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). These decisions clarified that the standard under 28 U.S.C. §2254(d) is "difficult to meet" and applies even where the state court

has summarily denied the claim. *Richter*, 562 U.S. at 784-86. *Pinholster* held that a review under §2254(d) is "limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. On the understanding that Section 2254(d)(2) indisputably limited review to the state court record, *see id.* at 1400 n.7, the Court held that "evidence introduced in federal court" also "has no bearing on §2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of §2254(d)(1) on the record that was before that state court." *Id.* at 1400.

In light of *Richter* and *Pinholster*, the State renewed its arguments in its post-hearing opposition brief that the court could not consider evidence produced in the evidentiary hearing. Doc. 118 at 3-21. In its post-hearing reply (to which the State was given no response), Brumfield argued for the first time anywhere that the state court had violated clearly established federal due process law by refusing to provide him with expert funding or allow him to supplement the record with expert testimony at the threshold stage. Doc. 121 at 1-20. That is, Brumfield's reply brief contained the first citations in this case to *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).[8] *Compare* JA 189a (amended habeas petition), JA 245a (application for a writ to the Louisiana Supreme Court), Doc. 30 (amended federal habeas petition), *with* Doc 121 (post-hearing reply).

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8. *Ford* was referenced in the amended habeas petition and the application to the Louisiana Supreme Court, but only as a secondary citation in the discussion of *Atkins*. JA 194a, 199a, 247a, 251a.

On February 22, 2012, the district court granted Brumfield's petition, ruling him ineligible for the death penalty under *Atkins*. The district court understood that, in light of *Richter* and *Pinholster*, it could no longer rely on "cause" and "prejudice" for procedural default as a justification for having held an evidentiary hearing or for using the new evidence adduced at that hearing to adjudicate Brumfield's *Atkins* claim *de novo*. Pet.App. 24a-26a. The district court correctly recognized that because the state court's decision was "on the merits," Brumfield's claims were all subject to Section 2254(d)'s relitigation bar absent a basis for withholding AEDPA deference. *Id.* 28a-30a. The district court held that "no AEDPA deference [was] due the state court's factual determination" because, for two reasons, the "state court unreasonably appli[ed] federal law as an antecedent to a factual determination." *Id.* 30a (citing *Panetti*, 551 U.S. at 953).

First, the district court held that the state court violated Section 2254(d)(1) by denying Brumfield his clearly established due process right to State-funded expert assistance. *Id.* 32a-36a. In the district court's view, Brumfield was entitled to expert funding as soon as he made a "rudimentary, preliminary showing of a colorable mental retardation claim." *Id.* 34a. Since Brumfield had made such a showing, according to the district court, the state court "violated [his] due process guarantees when it failed to allow him adequate funding to retain experts to address his claim." *Id.* 32a.

Second, the district court held that the state court violated Section 2254(d)(2) by making an unreasonable determination of the facts in light of the evidence

presented in that proceeding. *Id.* 36a-48a. The district court recognized that "[t]he record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation," and, as a result, the state court's "[f]inding that Brumfield failed to establish his *prima facie* case was not [an] unreasonable factual determination." *Id.* 42a. The state court's unreasonable factual determination, in the district court's opinion, was its decision to use "pre-*Atkins* sentencing evidence related to competency" to deny Brumfield an evidentiary hearing. *Id.* 46a. This error was "further compounded" by the fact that Brumfield "never had an opportunity to gain funding to hire experts to help support his claim of mental retardation." *Id.* 46a-47a.

The district court proceeded to *de novo* adjudication of the *Atkins* claim in light of the evidence adduced at the federal hearing. After reviewing the evidence, the district court found that Brumfield satisfied the three components of Louisiana's test for intellectual disability and issued a permanent injunction, forbidding the State from executing Brumfield. *Id.* 58a-98a.

2. The Court of Appeals

The Fifth Circuit reversed. As an initial matter, the Fifth Circuit agreed with the district court that the state court's judgment was "on the merits" and the state court's decision was entitled to deference under Section 2254(d) unless an exception applies. Pet.App. 11a. The Fifth Circuit concluded that no exception applied here.

First, the Fifth Circuit rejected the district court's conclusion that the state court violated Section 2254(d)(1)

by failing to provide Brumfield with the funds necessary to develop his claims. As the Fifth Circuit explained, "there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case." *Id.* 12a. The district court improperly "faulted the state court for failing to extend the due process precepts in *Atkins*, *Ford*, and *Panetti* to encompass this aspect of due process." *Id.*

Second, the Fifth Circuit rejected the district court's conclusion that the state court violated Section 2254(d)(2) by making the threshold determination based on the pre-*Atkins* record. After reviewing the record, the Fifth Circuit concluded "that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing." *Id.* 14a. Because Brumfield did not make a showing of intellectual disability based on the evidence in the record, the state court "did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue." *Id.* 15a.

Accordingly, the Fifth Circuit found that the district court should not have conducted an evidentiary hearing, disregarded the evidence adduced at it, and upheld the state court's decision under AEDPA's deferential standard. *Id.* 15a-16a. The Fifth Circuit made clear, however, that even if it "were to consider the new evidence presented to the district court, [it] likely would hold that Brumfield failed to establish an *Atkins* claim." *Id.* 16a n.8 (citing *State v. Dunn*, 41 So.3d 454 (La. 2010)).

SUMMARY OF ARGUMENT

"AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). Yet that is what Brumfield asks the Court to do. As the Fifth Circuit held, the state court reasonably determined the facts based on the record evidence and reasonably applied clearly established precedent to Brumfield's legal arguments. Brumfield's claims as to why the district court correctly held an evidentiary hearing and reviewed his *Atkins* claim *de novo* thus all miss the mark. In fact, Brumfield's claims, which mischaracterize the record below and are premised on unexhausted constitutional arguments, have less merit than even the Fifth Circuit realized.

First, Brumfield claims that the state court forfeited AEDPA deference by unreasonably determining "the facts" of his case "in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). To the extent he challenges the state court's determination based on the facts *in* the record, Brumfield's disagreement is with every federal judge to review his habeas petition—including the district court. These courts correctly found that the state court reasonably denied Brumfield's *Atkins* claim based on the record before it. That evidence showed Brumfield had an IQ of at least 75, had adaptive skills inconsistent with intellectual disability as demonstrated by his orchestration of this robbery and murder and other crimes, and had not manifested any signs of neuropsychological disorder before the age of 18. That the state court made this highly factual determination based on the testimony of *three* experts, all of whom conducted

exhaustive reviews and comprehensive intellectual testing, only confirms the reasonableness of its decision. There is no basis for overturning the state court's judgment on this ground.

Recognizing that his challenge to the state court's factfinding is untenable under AEDPA, Brumfield devotes most of his brief to arguing that the state court violated Section 2254(d)(2) by denying his claim based on the record from his pre-*Atkins* criminal trial and sentencing. But that argument fails as a matter of a law. Section 2254(d)(2)'s text limits the judicial inquiry to the "evidence" that *was* "presented in the State Court proceeding." The law is not a vehicle for objecting to the state court's decision to confine the record to certain matters. Even if the statute's terms were unclear, however, the Court's decision in *Pinholster* is not. That case holds that a Section 2254(d)(1) challenge is strictly limited to "the record that was before the state court." *Pinholster*, 131 S. Ct. at 1400. The majority and the dissent agreed that this understanding applies even more forcefully to Section 2254(d)(2). *Id.* at 1400 n.7; *id.* at 1416 (Sotomayor, J., dissenting). Accordingly, Brumfield's claim that the state court violated Section 2254(d)(2) by failing to admit additional expert testimony or otherwise hold a hearing cannot succeed.

Second, Brumfield claims that the state court forfeited AEDPA deference because its "decision involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). In particular, Brumfield argues that the refusal to provide him with state-funded expert assistance and/or allow him additional time to find his own expert at the threshold stage of the proceeding

violated his Fourteenth Amendment due process rights under *Atkins*, *Ake*, *Ford*, and *Panetti*. But Brumfield failed to exhaust this claim. To the extent he ever actually sought funding from the state court or asked for time to find *pro bono* expert assistance, Brumfield's claim was made only under state law. Brumfield's failure to properly exhaust enables the Court to either decline to reach the question or to reject his constitutional claim on the merits. 28 U.S.C. §2254(b)(2). But habeas relief is impermissible on this basis.

Brumfield's Section 2254(d)(1) claim also is meritless. No decision of this Court clearly establishes a due process right to state-funded expert assistance on state post-conviction review. *Atkins* did not establish procedural rights; the Court left it to the States to develop procedures for adjudicating intellectual disability claims. *Ake*, which affords defendants a right to state-funded assistance at trial, has not been extended to state post-conviction review because there is no right to appointed counsel at that stage of the proceeding. And *Ford*, which *Panetti* applied in the habeas setting, does not guarantee a right to funding at all, and certainly not at the threshold stage. Accordingly, there is no foundation for the due process right Brumfield asserts—let alone the "clearly established" right needed to prevail under Section 2254(d)(1).

Brumfield's contention that the simultaneous denial of his supposed funding request (which never materialized) and his request for an evidentiary hearing violated his due process rights is even weaker. The argument presumes that Brumfield had a clearly established right to submit expert testimony at the threshold stage of his *Atkins* claim. But he did not. The right cannot derive from *Atkins*,

and *Ford* and *Panetti* are the only other cases Brumfield relies on. He ignores, however, that the due process rights *Ford* addressed arose only *after* the threshold showing had been made. The sequencing problem *Panetti* identified likewise arose at a later stage because (unlike here) the threshold showing was not contested. Although he would like it to be the focus of the case, whether Brumfield should have such a right is not before the Court. That issue must be decided on direct review. Brumfield forfeited that chance when he did not seek certiorari after the Louisiana Supreme Court declined discretionary review.

Finally, if Brumfield prevails before this Court, the proper remedy is to remand the case to the Fifth Circuit for further proceedings. Although it indicated the district court likely erred in granting the habeas writ (even reviewing the *Atkins* claim *de novo* based on the evidence from the federal hearing), the Fifth Circuit has not yet decided the issue. The Court should follow its ordinary practice and allow the lower court to decide that question in the first instance. But regardless of which court decides the question, the answer is inescapable: Brumfield is not intellectually disabled. Brumfield was subjected to at least *six* evaluations before the age of 18 and not one diagnosed him as intellectually disabled. His behavior as an adult shows Brumfield has adequate adaptive skills. Brumfield's ability to orchestrate the sophisticated armed robbery that resulted in the cold-blooded murder of Corporal Smothers provides definitive proof. In short, Brumfield was lawfully sentenced to death under *Atkins*. The sentence should be affirmed.

ARGUMENT

I. The Court Should Deny Brumfield's Collateral Challenge To The State Court's Ruling Under Section 2254(d)(2).

Brumfield argues that the state court's adjudication of his *Atkins* claim is not entitled to AEDPA deference because it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). At times, Brumfield targets the state court's evaluation of the evidence actually in the record. *See, e.g.*, Pet. Br. 40 ("The pre-*Atkins* record ... contained a plethora of objective factors that support ... an intellectual disability diagnosis."). Other times, he targets the state court's refusal to expand the record before denying the *Atkins* claim at the threshold stage. *See, e.g.*, *id.* 40 ("It was patently unreasonable to deny Brumfield even a hearing on his *Atkins* claim based solely on his pre-*Atkins* penalty phase record."). Either way, Brumfield's claim lacks merit.

A. The State Court Reasonably Determined The Facts Of Brumfield's *Atkins* Claim In Light Of The Evidence In The Record.

Brumfield shoulders a heavy burden under Section 2254(d)(2) in arguing that the "state court's determination" that the facts in the evidentiary record did not "require a hearing on Brumfield's intellectual disability was patently unreasonable." Pet. Br. 21. Section 2254 imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19,

24 (2002). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

But Brumfield's Section 2254(d)(2) claim likely must be "reviewed under the arguably more deferential standard set out in §2254(e)(1)," *id.*, which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); *see also* Pet.App. 37a ("When evaluating the different prongs of a mental retardation inquiry, it appears that state court determinations of each prong are considered historical fact determinations that are reviewed for clear error and thus receive the full benefit of §2254(e)(1).").

The Court need not resolve the interaction between Sections 2254(d)(2) and (e)(1), however, because the state court's determination that Brumfield had not "carried his burden [of] placing the claim of mental retardation at issue," Pet.App. 172a, was reasonable. First off, Brumfield tries to color the Court's review of this issue by repeatedly stating that the state court only had before it the "pre-*Atkins* sentencing record." Pet. Br. 27. But that is a highly misleading characterization of the record upon which the state court based its decision. The record encompassed all the evidence from the guilt phase and included volumes of factual material, including testimony and reports from several experts, concerning every detail of Brumfield's birth, childhood, development, intelligence, and adult behavior. And he submitted to a battery of comprehensive

tests designed to assess his mental condition. *See supra* 6-9; *infra* 34-35. As the state court understood, that the record was created before *Atkins* and initially used for a different purpose is not a basis for discounting or ignoring the factual conclusions that reasonably can be drawn from it.

Based on this well-developed record, the state court determined that Brumfield had failed to show significant enough limitations either in intellectual functioning or the adaptive behavior to warrant an evidentiary hearing. Pet.App. 172a. Brumfield nevertheless claims that this factual determination was objectively unreasonable because the record "contained a plethora of objective factors that support ... a diagnosis" of intellectual disability. Pet. Br. 40. But Brumfield's argument cannot clear the high bar of Section 2254(d)(2) as the record evidence satisfied *none* of the objective factors necessary to warrant an evidentiary hearing or any other form of further review.

Intellectual functioning. Dr. Bolter found that Brumfield had an IQ of 75, and he noted that Dr. Jordan "rated his intelligence just a little higher than I did." Sent. 149. Both assessments are above the threshold for intellectual disability in Louisiana. *See Dunn*, 41 So.3d at 472 ("Not only has defendant never had a diagnosis of mental retardation prior to these proceedings, the range of possible IQ's that the more recently reported scores represent fall mostly above 70, indicating the defendant is not mentally retarded.").

Significant impairment in adaptive skills. Brumfield argues that he was entitled to a hearing because "there

was no discussion of adaptive skills in Brumfield's pre-*Atkins* sentencing record." Pet. Br. 30. The argument fails for three reasons. First, Brumfield's concession that he put forth insufficient evidence on this key issue confirms the correctness of the state court's decision that Brumfield had failed to put at issue an essential element of the test for intellectual disability.

Second, the absence of evidence on adaptive skills is conclusive given the exhaustive social history that was conducted by Dr. Guin, the testimony from multiple members of Brumfield's family, and the examinations by Dr. Bolter and Dr. Jordan. *Supra* 4-9. Despite the abundant testimony, there was nothing to "indicate that Brumfield was unable to live and function on his own in society or that he lacked the ability to care for himself, understand and use language, be mobile, or direct his life activities." Pet.App. 128a.

Third, and crucially, the evidence of Brumfield's crimes—including his planning and preparation, as well as his attempts to evade punishment—were in the record. In assessing adaptive skills it is "important to consider [his] behavior during the planning and commission of the instant crime." *Dunn*, 41 So.3d at 471. Brumfield scoped out the bank days in advance of the crime, rented a car off the street, and acquired both handguns used during the crime. *Supra* 1-4. Brumfield's plan, "with its premeditative aspects, clearly lacks the impulsiveness and non-leadership interactions associated with mentally retarded persons." *Dunn*, 41 So.3d at 472; *see id.* (finding no intellectual disability where "defendant engaged in the leadership and planning of a major bank robbery, which included discussing the robbery with [others] in advance,

borrowing a rental car from his girlfriend, driving ... [the car] to the bank, and ... [planning] to conceal commission of the crimes"). After the crime, Brumfield displayed survivor skills in his attempt to flee the scene, asking others to create alibis for him, disposing of the handguns and the car, and repeatedly lying to the police. *Supra* 1-4; *see, e.g.*, *State v. Brown*, 907 So.2d 1, 32 (2005) ("[Defendant's mental retardation] claim is undermined by his display of an intact survival mentality, which [he] exhibited when he destroyed all trace evidence of his crime[.]").

Manifestations of a neuropsychological disorder before the age of 18. None of the experts (including Brumfield's) testified that he showed signs of intellectual disability before the age of 18; all joined in Dr. Jordan's assessment that he instead had antisocial or sociopathic personality disorder and attention deficit disorder. *See supra* 6-9. And, Brumfield's reliance on his below average birth weight of 3.5 pounds as indicative of intellectual disability was undermined by Dr. Guin, who found he had a mostly normal birth and no "trauma from after the time that he was born until age four or five," Sent. 114, and by Dr. Bolter, who said that a weight in Brumfield's range is "not always predicting of [mental difficulties], and there can be children that are just fine at that weight," *id.* 148.

Accordingly, even discounting the record because it was created "pre-*Atkins*," which the Court should not, the state court did not unreasonably determine that Brumfield failed to meet his threshold burden. The expert testimony in the record was more than sufficient for the state court to make a factual determination. Dr. Guin had conducted a "social history," in which she tried to "find every single

source of information" about his life; Dr. Guin not only interviewed Brumfield, his teachers, his family, and state officials, she reviewed "every single psychological report that was ever done on him." Sent. 112-13, 141. Despite this exhaustive review, she found no evidence that anyone who came into contact with Brumfield suspected he might be intellectually disabled.

Even more probatively, Dr. Bolter "administered a comprehensive battery of neuropsychological measures," which included more than twenty intellectual assessment tests, all of which were "directed to assessing [Brumfield's] level of intelligence, basic achievement skills, psychomotor functions, psychosensory and perceptual skills in visual, auditory and tactile domains, mental flexibility, attention and concentration, receptive and expressive language functions, learning and memory and complex problem solving or abstraction." Bolter Report 6. After performing these tests, Dr. Bolter concluded that Brumfield's academic skills were "within the Low Average to Borderline range for basic academic skills" and his "problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." *Id.* 9.

Both Dr. Guin and Dr. Bolter also reviewed and relied upon Dr. Jordan's report. Sent. 113, 149. Dr. Jordan conducted a clinical interview, a psychological history, an Ammons Intelligence Test, a Rorschach Test, a Minnesota Multiphasic Personality Inventory, a Thematic Apperception Test, an Incomplete Sentences Test, a State-Trait Anxiety Test, a Draw-A-Person Test,

a Wide Range Achievement Test, and a Bender Gestalt Test. Report of Dr. Brian T. Jordan ("Jordan Report") 1. After conducting these tests, he concluded that Brumfield was "intellectually functioning at the lower end of the Low Average Range" and likely had a sociopathic personality and hyperactive disorder. *Id.* 4. Dr. Jordan made no finding of intellectual disability.

Given all this evidence, the state court was well within the bounds of reasonableness to reject a request for an evidentiary hearing that was predicated on chronology not substance. Brumfield received two neuropsychological evaluations and presented a social report that purported to document his entire life history, including every intellectual assessment he undertook before the age of 18. Brumfield attempts to minimize the experts' testimony involvement by arguing that they did not evaluate him for the *specific* purpose of detecting intellectual disability. Pet. Br. 5. But Brumfield makes no argument as to why or how such an instruction could have altered his experts' evaluations. It is unlikely Dr. Guin would have refrained from reporting evidence from Brumfield's childhood showing intellectual disability had she discovered it, or that Dr. Jordan or Dr. Bolter would have refrained from making a diagnosis of intellectual disability if they believed it was warranted. Given the extensive and reliable evidence regarding Brumfield's intellectual status in the record, the state court reasonably denied Brumfield's *Atkins* claim without further expert testimony or other supplemental evidence.

It should come as no surprise, then, that *every federal judge* to review Brumfield's claim has come to the same conclusion: the state court's factual determination must

be upheld if AEDPA deference applies. Pet.App. 127a-29a (magistrate judge) ("[W]hen only the evidence presented for the trial court's review at the October 2003 post-conviction relief hearing is considered, the Court finds that the trial judge's conclusion with respect to the need for an *Atkins* hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law."); *id.* 42a (district court) ("The record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation[.]"); *id.* 15a (Fifth Circuit) ("Based on the evidence in the record, we conclude that the state court did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue.").

That is perhaps why Brumfield focuses on process issues instead of vigorously contesting the state court's determination based on the actual record. Arguing that "[n]othing in his pre-*Atkins* sentencing record was dispositive of whether Brumfield was or was not intellectually disabled," Pet. Br. 27, will not overcome the substantial deference the state court is owed under AEDPA. The factual determination of Brumfield's *Atkins* claim was reasonable under Section 2254(d)(2) and should be upheld.

B. Brumfield's Claim That The State Court Violated Section 2254(d)(2) By Limiting Its Decision To The Existing Record Fails As A Matter Of Law.

Brumfield alternatively argues that the denial of his *Atkins* claim at the threshold stage was not a "reasonable

factual determination as a matter of law." Pet. Br. 18. Brumfield argues it was *per se* unreasonable for the state court to "definitively reject [his] claim of intellectual disability without a hearing and based solely on the pre-*Atkins* penalty phase record in this case." Pet. Br. 28. This argument is not cognizable under Section 2254(d)(2).

Section 2254(d)(2), as noted above, provides a basis for federal habeas relief when the adjudication "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(2). The statute therefore is directed at the "evidence" that was "presented in State court." *Id.* It is not a vehicle for a claim, like Brumfield's, that the court should have allowed a more robust evidentiary process before denying the application. Section 2254(d)(2) is not amenable to a claim that additional evidence should have been considered. That claim, if cognizable at all on federal habeas review, must stem from the Constitution or another source of federal rights that might attach to state post-conviction review. *Infra* 39-54. Section 2254(d)(2)'s text is unambiguous.

Pinholster forecloses the argument in any event. The Court explained that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of §2254(d)(1) on the record that was before that state court." *Pinholster*, 131 S. Ct. at 1400. In dissent, Justice Sotomayor contrasted Sections 2254(d)(1) and (d)(2), concluding that "[a]s between the two provisions §2254(d)(2)—which requires review of the state court's 'determination of the facts'—more logically depends on the facts presented to the state court." *Id.* at 1416 (Sotomayor, J., dissenting). The majority responded

that "[t]he additional clarity of §2254(d)(2) ... does not detract from our view that §2254(d)(1) *also* is plainly limited to the state-court record." *Pinholster*, 131 S. Ct. at 1400 n.7 (emphasis added). The point of agreement between the majority and dissent was that Section 2254(d)(2) claims are limited to facts admitted in the state-court proceeding.

But even if the Section 2254(d)(2) issue is beyond the holding of *Pinholster*, the opinion's reasoning dictates that outcome. Like Section 2254(d)(1), the provision uses "backward-looking language," *id.* at 1398, including "resulted in a decision," "was based on an unreasonable determination," and "presented in State court," 28 U.S.C. §2254(d)(1)-(2). It "follows" from such past-tense language "that the record under review is limited to the record in existence at that same time, *i.e.*, the record before the state court." *Pinholster*, 131 S. Ct. at 1398. Like Section 2254(d)(1), then, review under Section 2254(d)(2) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* A claim cannot be based on the court's failure to take into consideration additional facts never made part of the record. *Id.* Under *Pinholster*, these sibling provisions cannot be given different scopes.

The two cases Brumfield relies on do not support his novel interpretation of Section 2254(d)(2). Pet. Br. 28 (relying on *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Brumfield is correct, for example, that *Wiggins* held that the "state court acted unreasonably under §2254(d)(2) when it made a finding that was unsupported by the record." *Id.* But that conclusion in no way rested on a determination that

the state court had violated Section 2254(d)(2) in failing to admit additional evidence. Rather, the state court made a "clear factual error" in determining that "social service records ... recorded incidences of ... sexual abuse." *Wiggins*, 539 U.S. at 528. Unlike here, that is the kind of clear factual error that Section 2254(d) is designed to catch.

Similarly, Brumfield correctly interprets *Miller-El* to note that "§2254(d)(2) does not bar federal court review where [the] state court's determination is 'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" Pet. Br. 28 (quoting *Miller-El*, 537 U.S. at 340). Again, however, that does nothing to advance his claim, as Brumfield does not attempt to overturn the state court's judgment based on "evidence presented in the state-court proceeding." *Id.* He seeks to overturn the judgment because the state court failed to provide him funding and instead rejected his claim "based solely on the ... record in this case." *Id.* Neither *Miller-El* nor any other decision of this Court supports Brumfield's argument that this claim is cognizable under Section 2254(d)(2).[9]

II. The Court Should Deny Brumfield's Collateral Challenge To The State Court's Ruling Under Section 2254(d)(1).

Brumfield also argues that the state court is not entitled to deference under AEDPA because its "decision

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9. *Miller-El* did not even explore the issue Brumfield raises. The issue there was whether Section 2254(d)(2)'s high bar applied at the Certificate of Appealability ("COA") stage. *Miller-El*, 537 U.S. at 341-42. That issue is not implicated here.

... involved an unreasonable application of[] clearly established Federal law[] as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). Brumfield's argument fails for two independent reasons. First, he did not exhaust in state court the constitutional claims pressed here. Second, the due process rights that Brumfield relies upon to support his argument are not "clearly established" by any decision of this Court.

A. Brumfield Failed To Exhaust Either Due Process Claim.

AEDPA provides that "[a]n application for a writ of habeas corpus ... shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). "Under the exhaustion requirement," then, "a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." *Richter*, 131 S. Ct. at 787. Simply filing an application for post-conviction review in state court will not satisfy AEDPA. The issue for purposes of exhaustion is "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies." *Woodford v. Ngo*, 548 U.S. 81, 92 (2006).

To properly exhaust his state remedies, Brumfield needed to "fairly present [his] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of [his] federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). To that end, the state court must "be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id.* at 365-66; *see Baldwin v. Reese*,

541 U.S. 27, 32 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'"). Raising an analogous state-law claim will not suffice. *See e.g.*, *Duncan*, 513 U.S. at 366.

Brumfield did not exhaust either of the due process claims he presses on federal habeas review. In this forum, Brumfield argues that the refusal to provide him a State-funded expert violates his constitutional rights under *Atkins*, *Ford*, and *Panetti*. *See infra* 44-49. But he never raised this federal claim in state court. In state court, Brumfield only argued that, "[u]nder La. R.S. 15:149.1 and otherwise," the state post-conviction proceeding should be delayed so that he could "seek funding from [] this Court and request additional time to amend this petition once funding issues have been resolved." JA 207a; JA 254a, 259a-60a, 300a (repeating the claim verbatim in Brumfield's petition to the Louisiana Supreme Court).

Brumfield's funding claim was clearly made under state law. The "and otherwise" tagline did not put the state court on notice that Brumfield was raising a federal claim under the Due Process Clause. The petition does not label the funding claim as "federal," reference the United States Constitution, or rely on any federal cases. He did not even use the words "due process." Brumfield's failure to exhaust his claim that he had a due process right to supplement the record with expert testimony at the threshold stage is even clearer. Unlike the funding claim, he did not even raise this claim under state law—*he did*

not raise it all. The claim was not raised until deep into the federal-court habeas proceedings when Brumfield was searching for a way around *Pinholster* and *Richter*. *See supra* 21 Accordingly, this constitutional claim also is not exhausted.

The second question presumes Brumfield's Section 2254(d)(1) claim is properly raised. But it is not given Brumfield's failure to exhaust state remedies. It would be appropriate therefore for the Court to decline to reach the issue. *See, e.g., Walter v. United States*, 447 U.S. 649, 652 n.4 (1980). The Court also can deny Brumfield's Section 2254(d)(1) claim on the merits. 28 U.S.C. §2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). The Court cannot, however, grant Brumfield's federal habeas petition on claims that have not been exhausted. [10]

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10. The State did not expressly waive exhaustion. 28 U.S.C. §2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."). Stating that "it appears that petitioner has exhausted his state judicial remedies with respect to all claims he has presented in the instant petition," Doc. 11 at 8 (opposition to original petition for habeas corpus), does not meet Section 2254(b)(3)'s stringent standard for the "intentional relinquishment of a known right." *Carvajal v. Artus*, 633 F.3d 95, 105 (2d Cir. 2011); *Woodfox v. Cain*, 609 F.3d 774, 792 (5th Cir. 2010) (requiring "a clear and unambiguous intent to waive exhaustion"); *see, e.g., id.* ("no 'express waiver' where the State indicated that it merely 'believed' the prisoner had exhausted his claims"). Nor does the district court's finding of "cause" and "prejudice" have relevance. *Supra* 17. The district court excused Brumfield's procedural default of his fundamentally altered *Atkins* claim due to the lack

B. The Due Process Rights That Brumfield Asserts Are Not "Clearly Established."

Following the district court's lead, Brumfield argues that the state court's adjudication of his *Atkins* claim is not entitled to deference under Section 2254(d)(1) because the ruling "is dependent on an antecedent unreasonable application of federal law." *Panetti*, 551 U.S. at 953. He argues that the state court violated his due process rights by: (1) not granting him State-funded expert assistance; and (2) not giving him the opportunity to supplement the record with his own expert testimony at the threshold stage. Neither argument has merit.

The constitutional claims fail at the outset because the due process rights Brumfield presses are not clearly established. By "clearly established," Section 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "Therefore, federal habeas relief may be granted here" only if the Louisiana court's "decision was contrary to or involved an unreasonable application of this Court's applicable holdings." *Carey v. Musladin*, 549 U.S. 70, 74 (2006). No decision of this Court clearly holds that Brumfield had a due process right to expert assistance on post-conviction review or a right to supplement the record at the threshold stage of his *Atkins* claim.

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of expert funding. But the funding problem could not excuse Brumfield's failure to argue that the lack of funding violated his due process rights. And Brumfield would need to exhaust any ineffective assistance of counsel claim he might assert as a justification for excusing default here. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

1. Brumfield did not have a "clearly established" constitutional right to State-appointed expert assistance on post-conviction review.

Brumfield's principal claim under Section 2254(d)(1) is that the state court's failure to furnish him with "expert assistance in order to develop evidence for his claim of intellectual disability violated clearly established law determined by this Court." Pet. Br. 41. Brumfield argues, in particular, that this Court's decisions in *Atkins*, *Ake*, and *Ford* clearly establish a constitutional right to State-funded expert assistance as part of his post-conviction effort to establish intellectual disability. Pet. Br. 41-56. Brumfield's arguments all miss the mark.

Atkins certainly did not clearly establish this right. *Atkins* held that the Eighth Amendment prohibits a State from executing someone who is intellectually disabled. 536 U.S. at 321. But the Court left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford*, 477 U.S. at 416-17). *Atkins* thus "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within *Atkins*' compass.'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317); *Schriro v. Smith*, 546 U.S. 6, 7 (2005) (per curiam) ("The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim.").

Brumfield's reliance on *Ake* is similarly misplaced. *Ake* held that "when a defendant demonstrates to the *trial*

judge that his sanity at the time of the offense is to be a significant factor *at trial*, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83 (emphasis added); *Medina v. California*, 505 U.S. 437, 444 (1992) (explaining that *Ake* held that "when an indigent capital defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the defendant be provided access to the assistance of a psychiatrist"); *Coleman v. Thompson*, 501 U.S. 722, 741 (1991) ("*Ake* was a direct review case."). No decision of this Court has ever extended *Ake* to the post-conviction setting.

For good reason. The defendant's right to a state-appointed psychiatrist at trial is derivative of the right to appointed counsel. "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake*, 470 U.S. at 76. "[A]n indigent defendant" therefore "is entitled to the assistance of counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963), and on his first direct appeal as of right, *Douglas v. California*, 372 U.S. 353 (1963)." *Id.* *Ake* held that these "basic tools of an adequate defense or appeal" further require "the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Id.* at 77.

But the Court has been equally clear that the right to appointed counsel underlying *Ake* does not extend to state post-conviction review. *Pennsylvania v. Finley*, 481 U.S.

551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) ("*Finley* should apply no differently in capital cases than in noncapital cases."). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Id.*[11] Brumfield could not have had a clearly established right to state-appointed "expert assistance" in state post-conviction review of his *Atkins* claim when he did not have a right to appointed counsel.

Finally, Brumfield's reliance on *Ford* is unavailing. It is not clearly established that *Ford* applies in the *Atkins* context. The Court easily could have held that any right available under *Ford* applies to *Atkins* claims. But it did not. The Court instead allowed States to design rules for reviewing *Atkins* claims "[a]s was [its] approach in *Ford* ...." *Atkins*, 536 U.S. at 317. That is why "the substantive federal baseline for competency set down in *Ford*," *Panetti*, 551 U.S. at 935, is not the measure of whether an *Atkins* claim has merit, *Hall v. Florida*, 134 S. Ct. 1986, 1999-2000 (2014). *Ford* is no more established when it comes to *Atkins* claims from a procedural perspective than it is from a substantive perspective. With respect to either half of the equation, the States lack "definitive" guidance from this Court. *Bies*, 556 U.S. at 831.

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11. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not alter the rule. Under *Martinez*, ineffective assistance of state post-conviction counsel can in some cases excuse exhaustion. *Id.* at 1318-19. But that was an "equitable ruling," and not a "constitutional ruling that would require appointment of counsel in initial-review collateral proceedings." *Id.* at 1319.

But whether *Ford* applies to *Atkins* claims is not even the question here. The issue is whether it is an "open question," *Musladin*, 549 U.S. at 76, or whether a decision of this Court "squarely addresses the issue," *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam). Whatever differences of opinion there may be on this score, there is no "clear answer," *id.* at 126, as to whether a state rule for processing *Atkins* claims is *per se* unconstitutional if it would violate *Ford* or whether these are independent legal regimes. Nothing more is required to reject Brumfield's argument.

But even if *Ford* applies per force to *Atkins* claims, Brumfield's reliance on it is still misplaced. Whatever due process rights *Ford* might afford Brumfield are triggered only *after* the petitioner has "made 'a substantial threshold showing of insanity.'" *Panetti*, 551 U.S. at 949 (quoting *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in judgment)). *Ford* does not extend any such right to a petitioner, like Brumfield, who is still at the threshold stage. Pet. Br. 51-52. Brumfield therefore does not seek to apply *Ford* to the facts of his case. Indeed, the district court was clear that Brumfield should have been appointed expert assistance based on a "rudimentary, preliminary showing of a colorable mental retardation claim" because "no *prima facie* showing is likely possible" without it. Pet.App. 36a. Brumfield echoes this point in his opening brief. Pet. Br. 48.

Whatever the merits of this argument, it proves that Brumfield is asserting that *Atkins* petitioners are entitled to specific due process protections earlier in the proceeding than *Ford* petitioners. What Brumfield genuinely seeks is for the state court decision to be declared "unreasonable

in refusing to extend the governing legal principle to a context in which the principle should have controlled." *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014). But that is not a ground for relief under AEDPA. "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Id.* at 1706.

More fundamentally, *Ford* does not clearly establish a right to State-appointed expert assistance at all. Justice Powell's controlling opinion did not so hold. *Ford*, 477 U.S. at 418-27 (Powell, J., concurring in part and concurring in the judgment). Nor did *Panetti*. The issue in *Panetti* was the state court's delayed response to a funding request made under state law and its impact on Panetti at a stage in the proceeding where he was entitled to submit evidence (*i.e.*, after he had made the threshold showing). 551 U.S. at 951; *id.* at 974-75 (Thomas, J., dissenting). As the Fifth Circuit held on remand, "*Ford* and *Panetti* merely establish that Panetti was entitled to an *opportunity* to present his own expert testimony before a neutral decisionmaker; after all, the critical issue in both cases was that the relevant state's procedure for determining competency permitted only the government to submit evidence." *Panetti v. Stephens*, 727 F.3d 398, 408 (5th Cir. 2013), *cert. denied*, 135 S. Ct. 47 (2014).

Even if "Justice Powell's opinion constitutes 'clearly established' law for purposes" of *Atkins*, then, it would not aid Brumfield's cause. *Panetti*, 551 U.S. at 949. Neither *Ford* nor any of this Court's decisions applying it clearly establish a due process right to a State-appointed expert

at the threshold stage. *Atkins* does not clearly establish that petitioners claiming intellectual disability somehow have *Ford* rights superior to those claiming incompetency under *Ford* itself. That is not possible.

2. Brumfield did not have a "clearly established" constitutional right to supplement the record with expert testimony at the threshold stage.

Brumfield also claims that, aside from funding, the state court violated his due process rights under *Ford* when it denied him "the opportunity to obtain an expert by any other means, including possible *pro bono* sources...." Pet. Br. 41. The state court denied him this chance, Brumfield argues, by rejecting his *Atkins* claim "*before* addressing his request for assistance." *Id.* According to Brumfield, his claim therefore follows from *Panetti* in which the same due process violation occurred. *Id.* 51-54. The district court agreed. Pet.App. 30a-32a. The argument is baseless for several reasons.

As an initial matter, Brumfield never followed through and actually "submitt[ed] a separate motion for funding in this matter" "prior to the hearing on procedural bars," JA 244a, as he stated he intended to do. His claim thus fails at the outset, as it was inconceivable that Brumfield was "reasonably waiting to obtain a ruling on funding from the court." Pet. Br. 54. It is not fair to blame the state court for the manner in which it resolved a state-law funding claim that was never really made in the first place. *Cf. Boyer v. Louisiana*, 133 S. Ct. 1702, 1702-05 (2013) (Alito, J., concurring).

Regardless, *Ford* and *Panetti* (which applied *Ford* on federal habeas review) are not clearly established in the *Atkins* setting. *Supra* 46-47. And even if they are, Brumfield's claim still fails. Brumfield necessarily asks the Court to hold that, funding aside, he had a due process right to supplement the record with expert testimony at the threshold stage. Absent a due process right to submit expert testimony at that stage, after all, Brumfield has suffered no harm from the state court's simultaneous denial of the *Atkins* claim and funding request. Pet. Br. 53 (arguing that, "as in *Panetti*, the state court denied Brumfield an adequate opportunity to submit evidence by virtue of the unfair sequence in which it rejected his requests for funding and his claim of intellectual disability").

But Brumfield once again sidesteps precisely what *Ford* held and how *Panetti* applied it. Under *Ford*, "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protections afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 447 U.S. at 424, 426). *Panetti* applied *Ford* and held that the habeas petitioner had "made this showing," which was "disputed by no party, confirmed by the trial court's appointment of mental health experts .... and verified by our independent review of the record." *Id.* at 950.

That is not the case here. *Supra* 29-36. Thus, squarely in the middle of his argument that he has a due process right to submit expert testimony at the threshold stage, Brumfield is awkwardly forced to change direction and reassert that the state court "violated the clearly

established law of *Ford*" because "there can be no doubt that [he] made 'a substantial threshold showing' of intellectual disability." Pet. Br. 52. That is the definition of a circular argument; Brumfield's claim that *Ford* and *Panetti* clearly establish a due process right to supplement the record at the threshold stage, so long as the Court accepts that he has already made that threshold showing, falls of its own weight.

No other decision clearly establishes this novel due process right. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. Louisiana understood that it would need to establish a regime where the state court can make a threshold determination before devoting substantial time and resources to those *Atkins* claims that are potentially meritorious. *Williams*, 831 So. 2d at 853-58. Nothing in *Atkins* remotely suggests that petitioners would have a due process right to supplement the record at the threshold stage if the state court found that unwarranted given the case's circumstances. Even Brumfield recognizes that not all individuals bringing *Atkins* claims are entitled to the due process protections he asserts that the state court owed to him. Pet. Br. 35-36. What Brumfield seeks then is not a ruling from the Court that it violates due process to deny *Atkins* claims at the threshold stage without allowing for submission of expert reports. He seeks a ruling that doing so violated due process based on the facts of *his* case.

But that is precisely the kind of claim that Section 2254(d)(1) bars. The state court quite reasonably failed to extrapolate from *Atkins* a due process right to an expert

(state-funded or otherwise) at the threshold stage based on factors peculiar to this case. As this Court has explained, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 131 S. Ct. at 786. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

It is difficult to imagine a rule more general than one reliant on a decision (*Atkins*) that declines to establish any procedural requirements and two others (*Ford* and *Panetti*) that expressly hold that the due process right invoked does not apply to the stage of the proceeding at issue. To conclude that Brumfield had a clearly established right to submit expert testimony at the threshold stage of his *Atkins* claim would be nothing more than "habeas-by-sandbagging." *Pinholster*, 131 S. Ct. at 1398.

Brumfield's Section 2254(d)(1) argument has more to do with his disagreement with the constraints AEDPA imposes on federal habeas review than anything else. He protests that it should be "immaterial that [his] *Atkins* claim was litigated at postconviction, as opposed to at trial or sentencing." Pet. Br. 49. But the posture of the case makes all the difference. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 131 S. Ct. at 787. AEDPA furthers the

"principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

Brumfield additionally argues that "the adequacy of Louisiana's procedures in theory" is of no moment because "their application in this case cannot be squared with *Atkins*' most fundamental principle that the Constitution prohibits the execution of intellectually disabled persons." Pet. Br. 56. But if the base Eighth Amendment conclusion of *Atkins* were sufficient to establish a due process right to intricate procedures at the threshold stage, any limits on federal habeas review would be illusory. AEDPA limits relief to clearly established constitutional rights because state courts have no responsibility to predict where the law may lead. *White*, 134 S. Ct. at 1706 ("AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.").

Brumfield's frustration with AEDPA is misdirected. He had an avenue for judicial review he declined to pursue. He could have sought certiorari review directly from state post-conviction review. "Perhaps the logical next step from" *Atkins*, *Ford*, and *Panetti* "would be to hold" that the Due Process Clause requires the appointment of an expert or other protections at the threshold stage when state post-conviction review is the first opportunity to raise the *Atkins* claim; or "perhaps not." *White*, 134 S. Ct. at 1707. But "[t]he appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by §2254(d)(1)." *Id.*

That is what happened in *Hall*. As is the case here, "[w]hen Hall was first sentenced, this Court had not yet

ruled that the Eighth Amendment prohibits States from imposing the death penalty on persons with intellectual disability." *Hall*, 134 S. Ct. at 1990. Like Brumfield, Hall thus first raised his *Atkins* claim in a state post-conviction proceeding. *Id.* at 1991. Hall's claim was likewise rejected by the state courts. *Id.* Yet unlike Brumfield, Hall sought certiorari directly from the Florida Supreme Court's denial of post-conviction relief. *Id.* That was a wise choice; the Court favorably resolved his *Atkins* claim unencumbered by AEDPA's deferential standard. Indeed, it is likely that the posture of the case was decisive as it would have been difficult to argue that *Atkins* clearly established the rule the Court ultimately adopted in that case. *Id.* at 1994 ("On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*.").

Having failed to seek certiorari after the Louisiana Supreme Court denied discretionary review, which was his right, Brumfield cannot be heard to object to the difficult standard that he must meet to secure federal habeas relief. "If this standard is difficult to meet, that is because it was meant to be .... Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 131 S. Ct. at 786. Because he declined to seek direct review, Brumfield "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. He does not even come close to meeting this standard.

III. If Brumfield Prevails, The Proper Remedy Is To Vacate The Decision Below And Remand To The Fifth Circuit.

If Brumfield prevails on one of his Section 2254(d) claims, and the Court further holds that the identified error warrants *de novo* review incorporating the evidence adduced at the federal hearing, that does not end the case. The Fifth Circuit still has not issued a decision as to whether the district court correctly granted the writ. The case should be remanded so that the Fifth Circuit may address the issue in the first instance. That is the Court's usual practice, *see, e.g. United States v. Apel*, 134 S. Ct. 1144, 1153 (2014), and it should be followed here.

Remanding the case to the Fifth Circuit for initial review of the district court's *de novo* ruling is particularly appropriate given that the issue is fact-intensive and the Fifth Circuit has already devoted substantial resources to examining it. Although the Fifth Circuit ultimately did not need to reach the issue, it has already reviewed briefing and closely studied the record. In fact, the Fifth Circuit indicated it likely will reverse the district court's *de novo* ruling that Brumfield is intellectually disabled based on the evidence adduced in federal court. Pet.App. 16a n.8. There is a good reason why the Fifth Circuit, after closely examining the record, expressed doubt that the district court's ruling can be upheld: Brumfield is *not* intellectually disabled.

Even reviewing the question *de novo* and taking the additional evidence into consideration, Brumfield will not be able to meet the standard for intellectual disability. The complete record shows that Brumfield was subjected

to no fewer than *six* intellectual assessments before the age of 18 and "not one assessment ... diagnosed mental retardation or an IQ below 70." Blanche Report 6. In these assessments there was "not even a hint of [mental retardation], not even a rule-out or a question .... Nothing." Vol. IV, pg. 53. Instead, these assessments consistently demonstrated that Brumfield had an IQ in the 70-85 range, which is in the borderline range of general intelligence. Blanche Report 4-7; Hoppe Report 7-9. And, even after Brumfield turned 18, none of the four doctors who administered an IQ test found an IQ below 70. Hoppe Report 5; Jordan Report 4; Bolter Report 6; Report of Dr. Ricardo Weinstein ("Weinstein Report") 13. This is strong evidence that Brumfield cannot satisfy the "intellectual disability" prong of Louisiana's test for intellectual disability.

Given his borderline IQ range, Brumfield would need to show adaptive skills that were "substantially impaired" to be classified as intellectually disabled. *Dunn*, 41 So.3d at 470. Brumfield cannot meet this standard. Brumfield had adequate social skills, as he could communicate clearly with others, cooperatively play sports, and maintain personal relationships on some level, as demonstrated by his five children with three women. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where the defendant "lived with a girlfriend for some time" and was "described as a self-starter who worked well with others and on his own"). Brumfield also had adequate practical skills; he could drive a car, maintain a job, and had no trouble feeding, dressing, and caring for himself. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where "the defendant was capable

of filling out a job application and obtaining a job" and did not have poor personal hygiene).

Last, Brumfield had adequate conceptual skills; he could sign consent forms, write letters, read books, and earn substantial sums as a drug dealer. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where the defendant "was capable of dealing with all necessary paperwork and negotiation to purchase a car on his own"). In particular, Brumfield's adaptive skills in planning the robbery (*e.g.*, scoping out the bank days in advance, renting a car off the street, and purchasing the handguns) and then attempting to escape punishment (*e.g.*, fleeing the scene, asking others to create alibis, disposing of the handguns and the car, and repeatedly lying to the police) are strong evidence of satisfactory adaptive skills. *Supra* 1-4; *Dunn*, 41 So.3d at 472; *Brown*, 907 So.2d at 32. Moreover, Brumfield's chief witness, Dr. Weinstein, can be discounted because numerous courts have found his analysis not credible. Vol. I, pg. 227-34; Vol. III, pg 58-65; *see also United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 363 n.2, 374 (D.P.R. 2013) (highlighting his "checkered history" and finding his work "substantially biased and dishonest").

Again, the Court need not and should not consider these issues. If the Fifth Circuit erred, which it did not, the Court should follow its usual practice and remand the case so the Fifth Circuit can assess the *Atkins* claim *de novo*. But if the Court nonetheless reaches this question, the evidence supports only one conclusion: Brumfield is not intellectually disabled. Pet.App. 16a n.8 (citing *Dunn*, 41 So. 3d 454). He orchestrated and committed a premeditated, cold-blooded murder of a police officer.

Brumfield "act[ed] with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

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INTRODUCTION

There is no mistaking the stakes of this case. The only court to give Petitioner a hearing on his intellectual disability heard seven days of testimony from eleven witnesses, considered hundreds of pages of expert reports and exhibits, and found that Kevan Brumfield is intellectually disabled.

The evidence of his intellectual disability was overwhelming and uncontroversial. The testimony was unanimous that Brumfield's IQ scores—which fell between 65 and 70—were consistent with intellectual disability. And the district court credited the wealth of expert testimony regarding Brumfield's deficits in adaptive skills. The evidence included, but was not limited to, Brumfield's severely limited ability to write—requiring an inordinate amount of time, and requiring assistance, to write a simple letter; a lack of motor skills that renders him unable to write without a piece of cardboard to guide him; his severe developmental delay compared to his peers; his fourth-grade reading level and lack of competence in virtually every academic area; his consistent and repeated placement in special education and mental health facilities; and the prevalence of intellectual disability among his blood relatives.

The district court discredited both of the State's experts, Drs. Blanche and Hoppe (from whom the State now selectively quotes in its brief)—one a prison physician who had never heard of the AAMR/AAIDD at the time of his involvement in this case and had "no formal training in administering psychological testing," *see* Pet. App. 56a-57a & n.22, and the other who

recognized that the clinical standards required him to interview Brumfield's family, friends, and peers, but was prevented from doing so by the State's counsel, *see* Pet. App. 55a-56a & n.21.[1]

The State's hope now is that the district court's finding of intellectual disability will be disregarded out of deference to the state postconviction court, which denied Brumfield any hearing at all. The State's brief, however, only underscores the unreasonableness of the state postconviction court's determination. The State does not dispute, for example, that the sole ground articulated by the state court was that Brumfield had been diagnosed during sentencing with an antisocial personality. Yet it ignores the fact that the unanimous consensus of the medical and clinical communities is that antisocial personality disorders are positive indicators of, not inconsistent with, intellectual disability. Instead, the State offers post-hoc rationalizations *not* offered by the state court, each of which imagines the court digging through the pre-*Atkins* trial record and rendering its own lay diagnosis, without identifying a single fact that is disqualifying of intellectual disability. Nothing in the State's brief provides a basis for setting aside the district court's determination that Brumfield is intellectually disabled and thus ineligible for execution.

---

[1] The State is wrong that it will be entitled to *de novo* review of the district court's findings on remand. Resp. Br. 57. Intellectual disability is a factual determination reviewed for clear error. *See, e.g.*, *State v. Turner*, 936 So. 2d 89, 98 (La. 2006); *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011).

ARGUMENT

I. The State Court's Rejection Of Brumfield's Claim Of Intellectual Disability Based On The Pre-*Atkins* Record Was Unreasonable.

The State does not dispute that, at the time of Brumfield's trial, Louisiana did not prohibit the execution of intellectually disabled persons and had no relevant definition of intellectual disability. Pet. Br. 25-26, 30. It does not dispute that Brumfield never attempted to mitigate based on his intellectual disability, Pet. Br. 30-32, and, in fact, had good reason not to do so, Pet. Br. 32-33.

Nor does the State dispute that, notwithstanding the fundamental differences between Brumfield's pre-*Atkins* sentencing hearing and an *Atkins* hearing, the record before the state court contained many red flags signaling Brumfield's intellectual disability. The State does not dispute that the evidence before the state court established that Brumfield had scored 75 on an IQ test, had at best a fourth-grade reading level, spent much of his schooling in special education classes, needed someone to "help him function" both at school and at home, and had the "basic problem" that he "could not process information." Pet. Br. 1, 36-37. It does not dispute—because it cannot—that all of these facts are core objective indicia of intellectual disability. Pet. Br. 1, 37.

Instead of engaging with any of these facts, the State argues around the issues presented in ways that have nothing to do with the state court's factual

determination and, if anything, underscore its unreasonableness.

A. The IQ Score Of 75 Was Not "Above The Threshold For Intellectual Disability In Louisiana."

For the first time in these proceedings, the State claims that testimony from Brumfield's penalty phase that he scored a 75 on one doctor's IQ test and "just a little higher" from another doctor who "only did a screening test," JA 133a, put Brumfield "above the threshold for intellectual disability in Louisiana." Resp. Br. 31 (citing *State v. Dunn*, 41 So. 3d 454, 472 (La. 2010)).[2]

This argument conflicts with the State's prior representation to this Court that Louisiana has no IQ threshold. *See* Cert. Opp. 64-66. It also conflicts with the state court's decision, which did not purport to find Brumfield's scores in excess of any relevant threshold. Pet. App. 171a-172a. Indeed, Louisiana courts recognize that an IQ of 75 indicates the possibility of intellectual disability. The very case on which the State relies, *State v. Dunn*, makes this clear. There, the defendant received two IQ scores of 75. Specifically addressing those scores, the court explained:

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[2] The IQ score that was "just a little bit higher" was mentioned exclusively in Dr. Bolter's explanation that the score was not reliable because it was based on "a screening test" and not "a standardized measure of intellectual functioning." JA 133a. *See also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("Invalid scores may result from the use of brief intelligence screening tests.").

> it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired. Because of the defendant's borderline I.Q. scores, his diagnosis is heavily dependent on his adaptive functioning.

41 So. 3d 454, 470 (La. 2010). In fact, in *Dunn* itself the defendant had been sentenced to death prior to *Atkins*. The Louisiana Supreme Court held that it was necessary to afford him a hearing on his intellectual disability in light of testimony that his "IQ is very close to that which would indicate mental retardation." *State v. Dunn*, 831 So. 2d 862, 886 (La. 2002). The court explained that it would have been "patently unjust" to rely on the pre-*Atkins* record because intellectual disability was only "marginally relevant when th[e] case was tried" and thus "[t]he defense was not called upon to exert time, energy, and effort in marshaling proof of mental retardation at the trial." *Id.*

This Court and all relevant clinical authorities have likewise recognized that an IQ score of 75 indicates the possibility of intellectual disability. Pet. Br. 28-29. The score thus provided no reasonable basis to rule out Brumfield's intellectual disability without a hearing.

B. It Was Unreasonable To Determine That Brumfield Lacked Impairment In Adaptive Skills Based On His Pre-*Atkins* Record.

1. The State Does Not Dispute That The Sole Factual Basis Relied On By The State Court Was Unreasonable.

The State wholly ignores the postconviction court's only rationale for determining that Brumfield lacked impairment in adaptive skills: that he instead had an antisocial personality. Pet. App. 171a-72a. It does not dispute that there was no support in the record for the inference that antisocial conduct disorders somehow exclude intellectual disability. Pet. Br. 38. And it does not dispute that there is unanimous scientific consensus in the medical community that antisocial conduct disorders coexist with, and even *affirmatively indicate the presence of*, intellectual disability. Pet. Br. 38-39; *see also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 158 (11th ed. 2010) ("AAIDD 11th") ("Boys with ID and higher IQ scores have been reported to exhibit antisocial and delinquent behaviors more frequently than do their male peers without ID."); *see also Hall v. Florida*, 134 S. Ct. 1986, 1994, 2000 (2014) ("[S]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability and thus the factual determination of intellectual disability should be "informed by the medical community's diagnostic framework.").

In other words, the State does not and cannot dispute that the only factual basis articulated by the state court was unreasonable. This Court thus need

not reach the State's hypothetical, post-hoc rationalizations of the state court's decision, which, as explained below, fail on their own accord. *See Wiggins v. Smith*, 539 U.S. 510, 527-32 (2003) (reviewing petitioner's constitutional claim *de novo* where the reasons articulated by the state court were unreasonable without considering other hypothetical bases for the state court's decision); *Lafler v. Cooper*, 132 S. Ct. 1376, 1390-91 (2012) (same); *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011) (explaining that § 2254(d) may require consideration of possible reasonable bases where "the "state court's decision is unaccompanied by an explanation," but acknowledging that federal courts must respect when state courts provide explanations or "elaborate more fully" (citing *Evans v. Chavis*, 546 U.S. 189, 197, 199 (2006))).

2. The State's Post-Hoc Hypothetical Justifications Would Not Have Been Reasonable Bases To Rule Out Brumfield's Intellectual Disability Without A Hearing.

The State's three post-hoc justifications for the postconviction court's determination—none of which was articulated by the court itself—confirm the unreasonableness of the determination.

First, the State contends that Brumfield's observation that there was no discussion of adaptive skills at his penalty phase proceeding, Pet. Br. 30, confirms that he "failed to put at issue" his intellectual disability. Resp. Br. at 32. The State misses the point. That Brumfield's penalty phase record was devoid of any discussion of adaptive skills underscores the irrationality of treating that record as adequate to

resolve whether he had a clinical deficiency in adaptive skills. Brumfield never attempted to prove his intellectual disability or his impairment in adaptive skills at his penalty phase. His sentencing pre-dated *Atkins*, at a time when mitigation based on "mental retardation" was seen as a "two-edged sword." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The absence of expert discussion of "adaptive skills" in a pre-*Atkins* record is indicative of nothing.

Second, the State argues that if Brumfield were intellectually disabled, surely a diagnosis would have been found in his pre-*Atkins* sentencing record. Resp. Br. 32-36. As a preliminary matter, the State relies chiefly on the reports of Drs. Jordan (Resp. Br. 3, 30, 32, 33, 34-35), Guin (Resp. Br. 3, 5, 30, 32, 33, 35), and Bolter (Resp. Br. 3, 6, 7-8, 9, 30, 32, 34, 35). The State conceded, however, that Dr. Jordan's report was "never submitted into evidence at any stage of the state court proceedings." *See* Pet. App. 39a n.13.[3] The Guin and Bolter reports similarly were never in evidence. The first time any of these reports was admitted into evidence was at Brumfield's federal habeas proceeding. Dkt. No. 110. The State's reliance on these reports violates § 2254(d)(2) (limiting consideration to "the evidence presented in the State court proceeding"), and is ironic given the State's repeated citation of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

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[3] Limited aspects of Dr. Jordan's report were raised in cross-examination. JA 108a, 114a-15a, 132a-33a.

Furthermore, the clinical guidelines are clear that, for several reasons, no inference can be drawn from "the lack of an earlier, official diagnosis of mental retardation," including that persons are frequently given "no diagnosis or a different diagnosis for 'political purposes' such as protection from stigma" and a "school's concern about over-representation . of specific diagnostic groups." AAIDD, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* 18 (10th ed. 2007) ("AAIDD 10th User's Guide").[4]

In any case, the State mischaracterizes those reports and the expert testimony in the record. The state court's determination was not based on "the testimony of *three* experts, all of whom conducted exhaustive reviews and comprehensive intellectual testing." Resp. Br. 25-26 (emphasis in original). The record contained the testimony of *two* experts—Drs. Guin and Bolter—*neither* of whom conducted reviews or testing designed or intended to reveal whether Brumfield was intellectually disabled.[5]

Dr. Guin was a social worker. JA 51a. She did not conduct—nor is there any indication that she would have been qualified to conduct—"comprehensive intellectual testing." Resp. Br. 26. Rather, she

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[4] Indeed, as the district court found, Brumfield's education system had a policy of *deliberately* avoiding the label of "mentally retarded" for African American students like him if another, less stigmatizing diagnosis was available. Pet. App. 77a-78a, 93a.

[5] Contrary to the State's misrepresentation, Dr. Jordan never testified at any point.

completed a social history of Brumfield and testified to his abusive family and difficulties in school. The State's assertion, without citation, that Dr. Guin "found no evidence that anyone who came into contact with Brumfield suspected he might be intellectually disabled," Resp. Br. 34, mischaracterizes the record.

Neither Dr. Guin's report nor her testimony provided a reasonable basis to rule out Brumfield's intellectual disability. Quite the opposite. Her report stated that the "factors that affected Kevan's development" were "an outgrowth of the intellectual disabilities that he was born with." JA 395a. It explained that Kevan's teachers repeatedly sought evaluations that were not completed and "felt that he had 'fallen through the cracks.'" JA 372a. He was ultimately diagnosed as "behaviorally disordered," but the accuracy of that diagnosis was "questionable" because "a great deal less was known about intellectual deficiencies" at the time, and "the diagnosis and treatment did not consider the fact that Kevan had some intellectual deficits that affected his ability to perform." JA 387a, 396a. Nonetheless, the records demonstrated that Brumfield "was born with some type of decreased or lowered responses"; maintained a "slowness in perceptual motor development" throughout his development; and, notwithstanding special education, could only "recognize words" and not "understand their meaning." JA 374a-75a, 384a. Dr. Guin concluded both that Brumfield was simply "unable to process and retain information in a comparable manner with other children." JA 395a. The State's belief that this history provided a reasonable basis to

reject Brumfield's claim of intellectual disability without a hearing defies explanation.

Dr. Bolter was qualified to testify about "the effects of brain injury or insult to somebody's central nervous system on their behavior," JA 124a, and he examined Brumfield for organic (*i.e.*, physical) brain damage. The State nevertheless points to Dr. Bolter's statement that he administered a "battery of comprehensive tests" and suggests, without support, that this provided a reasonable basis to infer the absence of any deficiency in adaptive skills. *See, e.g.*, Resp. Br. 30-31. That is unsupported by the record and wrong as a matter of clinical fact.

It is widely recognized that "a background in neuropsychology does not assure expertise or experience with people with mental retardation, and most of the customary neuropsychological tests do not provide the information needed for a diagnosis of mental retardation."[6] Dr. Bolter was never asked to, nor did he, inquire whether Brumfield was or was not intellectually disabled. Rather, he specified that the tests he performed were designed to determine whether Brumfield was "manifesting neurocognitive deficits associated with organic brain impairment." JA 407a. Dr. Bolter did not perform *any* of the tests recognized by the relevant clinical manuals for evaluating adaptive skills in the context of intellectual disability. *See* AAMR, *Mental Retardation: Definition,*

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[6] J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 Applied Neuropsychology 135, 135 (2009).

Classification, and Systems of Support 87-90 (10th ed. 2002) ("AAIDD 10th") (describing Vineland Adaptive Behavior Scales; AAMR Adaptive Behavior Scales; Scales of Independent Behavior-Revised; Comprehensive Test of Adaptive Behavior; and Adaptive Behavior Assessment System, and explaining the importance of assessing adaptive skills using the correct measures); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000) ("DSM-IV-TR") (identifying Vineland Adaptive Behavior Scales and AAMR Adaptive Behavior Scales); *see also* Marc J. Tassé, *The Construct of Adaptive Behavior: Its Conceptualization, Measurement, and Use in the Field of Intellectual Disability*, 117 Am. J. Intell. & Developmental Disabilities 291, 293 (2012) (identifying "four comprehensive individualized, standardized, and psychometrically sound adaptive behavior scales" that "have been developed specifically for the purpose of ruling in or out a diagnosis of ID"); Pet. App. 58a n.23 (Dr. Bolter's assessment "does not shed much light" because it "was not an *Atkins*-tailored inquiry").

Moreover, Dr. Bolter could not possibly have performed the comprehensive retrospective analysis required by the clinical guidelines, *see* AAIDD 11th at 94-96, as he explained that he had only a "cursory understanding . . . of [Brumfield's] history" and only limited time to interview him. JA 131a. Thus, even pretending that the state court considered Dr. Bolter's

report, it would have been unreasonable to infer that it somehow ruled out intellectual disability.[7]

The State further asserts that there is no reason to think that the evidence at Brumfield's pre-*Atkins* sentencing would have been different had he retained and instructed experts to evaluate whether he was intellectually disabled. That assertion defies the relevant case law, the medical literature, and common sense. *See Dunn*, 41 So. 3d at 469 (providing a "cautionary note for clinical practitioners and diagnosticians" that a diagnosis of mental retardation requires "exceedingly fine distinctions" and "careful consideration of all available information" that "applies far more forcefully in a forensic context for Eighth Amendment purposes" (quoting DSM-IV-TR at 43, 45)). When the right questions were asked at Brumfield's federal hearing, they, in fact, revealed a far more complete history, including, for instance, more comprehensive records related to his low intellectual functioning as a child and the history of intellectual disability among his family members. When the right tests and retrospective analysis were performed, it was found, for instance, that Brumfield takes inordinately long to write a simple letter; cannot write in a straight line without a piece of cardboard to guide him; and lacks competence in virtually every academic area. The State's unsupported musing that a proper *Atkins*

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[7] Dr. Bolter's report also states that Brumfield's performance on the WAIS-R test included scores in the range of "mentally defective." JA 416a.

hearing would have developed no additional evidence is demonstrably absurd.[8]

Finally, the State's third post-hoc defense is that the facts of the underlying crime demonstrate "adaptive skills inconsistent with intellectual disability." Resp. Br. 25, 32-33. Again, the state court itself never said any such thing, and had it, the conclusion would have been objectively unreasonable. It is uncontroverted that

> [m]aking a diagnosis of mental retardation is often challenging and should only be conducted by qualified professionals. Most individuals with mental retardation will have strengths and areas of ability. . . . [L]aypersons may erroneously interpret these pockets of strengths and skills as inconsistent with mental retardation because of their misconceptions regarding what someone with mental retardation can or cannot do. . . . Mental retardation is a clinical diagnosis that should be made or ruled out based on a rigorous and comprehensive professional evaluation of the individual's intellectual functioning and adaptive behavior.[9]

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[8] Dr. Swanson's testimony, credited by the district court, also confirmed that Dr. Bolter's neuropsychology battery did not include any assessment of Brumfield's adaptive skills. Fed. Tr. Vol. VI at 183.

[9] Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009) (citations omitted).

Similarly, "within an individual, limitations often coexist with strengths. Individuals may have capabilities and strengths that are independent of ID such as strengths in social or physical capabilities, some adaptive-skill areas, or in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* 25 (11th ed. 2012) ("AAIDD 11th User's Guide"). Thus, it is simply an error of clinical logic to look at an arbitrary subset of things that an individual with a qualifying IQ score *can* do, without evaluating whether he has limitations in any of the areas of adaptive skills. That error is compounded when the exercise is undertaken by someone who is not specifically trained in evaluating impairments in adaptive skills.

Furthermore, the clinical standards relied on in *Atkins*, and thereafter adopted in Louisiana, uniformly caution against drawing lay inferences from a person's prior criminal behavior. *See* AAIDD 10th User's Guide, ("Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior"); AAIDD 10th at 79 ("Adaptive behavior is considered to be conceptually different from maladaptive or problem behavior[.]").

The State argues that under *State v. Dunn*, 41 So. 3d 454 (La. 2010), it would have been reasonable to determine the question of Brumfield's intellectual disability based on a lay inference from criminal behavior. *Dunn*, however, stands for just the opposite. In *Dunn*, the defendant was sentenced to death prior to *Atkins*. Notwithstanding the "firmly established facts"

at trial that the "defendant engaged in the leadership and planning of a major bank robbery," the court held that it was necessary to remand for a full hearing on the defendant's intellectual disability. *Id.* at 458, 471; *see also Dunn*, 831 So. 2d at 885-86 (rejecting the argument that "anecdotal evidence" regarding defendant's criminal and other behavior "established the defendant is not mentally retarded because of his adaptive skills" and remanding for an *Atkins* hearing).

In any case, the statements that the State cherrypicks from Brumfield's confession do not support its assertion that he demonstrated leadership that is somehow inconsistent with intellectual disability. Resp. Br. 32-33. The State's gloss has no basis in the record. Pet. App. 84a-85a ("[N]othing in Brumfield's confession makes clear that Brumfield, rather than another one of his confederates, 'led' this terrible scheme," and more likely "Brumfield was gullibly convinced to join in the crime instead of actively planning out its details."); *see also Atkins*, 536 U.S. at 320 (recognizing that confessions are inherently less reliable in cases of intellectual disability).

Virtually all *Atkins* cases involve a premeditated murder from which some base level of competence can be inferred. Pet. App 83a. There is nothing about the facts of this case—that an individual borrowed a gun and a car, participated in a crude and bumbled ambush, and subsequently claimed his innocence—that would have allowed the state court to reasonably conclude that the crime was inconsistent with intellectual disability. *See* AAIDD 11th User's Guide at 26 (cautioning against lay misconceptions that

intellectually disabled persons are incapable of "complex tasks," cannot "get driver's licenses, buy cars or drive cars," "support their families," or "acquire vocational and social skills necessary for independent living"); *Dunn*, 41 So. 3d at 469 (explaining that *Atkins* requires "exceedingly fine distinctions between those persons who are exempt from capital punishment and those who are not because mildly mentally retarded persons are capable of working and living on their own just as persons of borderline intelligence" (citing DSM-IV-TR at 43)).

C. The State's Arguments Regarding The Scope Of This Court's Review Under § 2254(d)(2) Are Meritless.

The State argues that § 2254(e)(1) "likely" affords the state court's unreasonable determination a presumption of correctness that can be overcome only by clear and convincing evidence. Resp. Br. 30. The relationship between § 2254(d)(2) and (e)(1)—an issue on which the circuits are divided and which the State never raised in its opposition to certiorari—is not before the Court. Even if it were, however, it would be immaterial. The prevailing view is that § 2254(e)(1) has no application to the threshold inquiry under § 2254(d)(2). *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2[c], at 1044-60 (6th ed. 2011); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (Kozinski, J.).

In any case, even under the alternative interpretation applied in some circuits, "[t]he clear-and-convincing evidence standard of § 2254(e)(1) . . . pertains only to a state court's determinations of

particular factual issues, while § 2254(d)(2) pertains to the state court's decision as a whole." *Blue*, 665 F.3d at 654. Here, the state court based its "decision as a whole" on two "determinations of particular factual issues" to which § 2254(e)(1) could apply: (i) that Brumfield had an IQ score of 75; and (ii) that he was diagnosed with antisocial personality. Brumfield does not challenge either fact. He argues that neither provided a reasonable basis for ruling out intellectual disability.

The State separately contends that Brumfield's argument conflicts with § 2254(d)(2) and the rule of *Pinholster*, which limit the permissible inquiry to evidence in the state court record. Resp. Br. 36-39. That is nonsense. Brumfield's argument is premised only on the evidence that was before the state postconviction court. After Brumfield made a proffer of objective facts in support of his intellectual disability, the state court unreasonably determined that his intellectual disability could be ruled out without a hearing, based on a record that was created for an unrelated purpose, under a different legal regime, and without the relevant expert analysis. No part of the argument relies on evidence that was not before the state court.

The Court need not go further in this case and articulate the boundaries of § 2254(d)(2)'s more "procedural" contours. In any event, however, the vast weight of authority in the circuits and relevant scholarship recognizes that the plain text of § 2254(d)(2) mandates consideration of not only the substance of the state court's determination, but also the process

employed by the state court. *See, e.g.*, *Taylor*, 366 F.3d at 999-1001 (Section 2254(d)(2) requires consideration of whether "the process employed by the state court is defective"); 1 Hertz & Liebman, *supra*, § 20.2[c] at 1051-55 & n.87 (the word "determination" mandates consideration of whether the state court's finding was both procedurally and substantively reasonable (quoting *Webster's Ninth New Collegiate Dictionary* 346 (1983), and collecting cases); 7 Wayne R. LaFave et al., *Criminal Procedure* § 28.7(a), at 265 (3d ed. 2007) ("lower courts have concluded that the fact finding process" is "relevant in determining whether or not a petitioner has met his burden of demonstrating that the state finding was unreasonable"); Brian R. Means, *Federal Habeas Manual* § 3:83 (2014) (circuits consider "(a) the adequacy of the process used by the state court in reaching its finding, and (b) the substantive reasonableness of the factual finding").

II. The State Court's Failure To Assure Access To A Mental Health Expert Violated Clearly Established Federal Law.

A. The State's Exhaustion Argument Is Meritless.

The State argues—for the first time—that Brumfield failed to exhaust his claim that the Constitution guaranteed him access to a mental health expert. Resp. Br. 40-41. That argument has been expressly waived and, even if it were not, Brumfield plainly exhausted his claim.

1. *The State's Express Waiver.* The State failed even to mention exhaustion at the Fifth Circuit or in its opposition to certiorari. And for good reason.

A claim is exhausted when "it appears that . . . the applicant has exhausted" his remedies in state court. 28 U.S.C. § 2254(b)(1)(A). In its Answer to Brumfield's initial federal habeas petition, the State expressly acknowledged Brumfield's claim based on the denial of funding and represented: "It appears that petitioner has exhausted his state judicial remedies with respect to all claims he has presented in the instant petition." JA 269a-70a. It is difficult to imagine a more explicit waiver. The State's language tracked the statutory exhaustion requirement verbatim.

Moreover, throughout these proceedings, the State has consistently argued that the state court adjudicated Brumfield's claim "on the merits," *see, e.g.*, State's Post-Hearing Memorandum 12, 18 (M.D. La.) (ECF No. 118); State's Br. 13, 15 (5th Cir.); Cert. Opp. 35-36 (stating that there was a "decision on the merits of this issue"), and both of the lower courts so held, *see* Pet. App. 36a; Pet. App. 11a n.6. The State's newfound position that Brumfield's expert funding claim was not fairly presented is irreconcilable with these representations. *See, e.g., Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) ("A judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments.'" (citation omitted) (emphasis and ellipsis in original)).

2. *Brumfield Has Exhausted.* In any event, Brumfield exhausted his federal constitutional claim

that he was entitled to a mental health expert. Again, this necessarily follows from the fact that both courts below found Brumfield's claim to be adjudicated on the merits.

Moreover, as the State acknowledges, a petitioner exhausts his federal constitutional claim "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds." Resp. Br. 40-41 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). Brumfield did both. He expressly framed his claim as arising under the federal Constitution *and* state law. JA 189a, 193a. And he premised his numerous requests for expert assistance on *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287 (La. 1992)—the case which effectuates the federal right to funding recognized in *Ake v. Oklahoma*, 470 U.S. 68 (1985), in Louisiana postconviction proceedings, and which relies exclusively on *Ake*, *see* JA 177a-78a & nn.1&2, 181a-82a & nn.1&2, 184a-85a & nn.1&2, 187a-88a nn.1&2. There is no question that Brumfield adequately "indicate[d] the federal law basis for his claim." *Baldwin*, 541 U.S. at 32; *see also Johnson v. Cain*, 712 F.3d 227, 232 n.4 (5th Cir. 2013).[10]

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[10] If the Court concludes that the State has not waived exhaustion and Brumfield did not exhaust, it must remand to the district court to consider whether the claim has been procedurally defaulted and, if so, whether there exists cause and prejudice. *See Cone v. Bell*, 556 U.S. 449, 475 (2009) (remanding to district court where it had no opportunity to consider the issue in the first instance).

B. The State Court's Denial Of Access To Expert Assistance Violated This Court's Clearly Established Precedent.

1. *The State Court Violated* Ake. The State does not dispute that this Court's analysis in *Ake* compels the conclusion that denial of access to an expert to prove one's intellectual disability under *Atkins* violates the Due Process Clause. Pet. Br. 45-49. And the State does not dispute that *Atkins* is retroactively applicable to inmates, such as Brumfield, whose convictions were already final. Pet. Br. 49 & n.12. It does not even attempt to argue that Brumfield received the requisite due process for proving intellectual disability. Instead, it argues—for the first time—that *Ake* is not "clearly established" because Brumfield raised his claim at postconviction, not trial. *See* Resp. Br. 44-45. This argument fails for several reasons.

First, though the distinction between trial and postconviction may be meaningful in other instances, here it is not. Brumfield's *Atkins* claim was "collateral" or "postconviction" in only the most superficial sense. Following *Atkins*, it was Brumfield's *very first opportunity* to prove that he was intellectual disabled. *See Hooks v. Workman*, 689 F.3d 1148, 1183 & n.18 (10th Cir. 2012) (where petitioner raises intellectual disability at "the 'first designated proceeding' at which he could," his claim is "'postconviction' only in the strict chronological sense"); *cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the

equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.").

For the same reasons, the State's argument that there is no general right to counsel for collateral attacks, *see* Resp. Br. 45-46, is beside the point. Brumfield does not argue that petitioners have a general constitutional right to expert assistance (or counsel) "when mounting collateral attacks." *Id.* (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Rather, in this rare circumstance, where Brumfield sought his first opportunity to prove that he is ineligible for execution by virtue of his intellectual disability, no meaningful distinction arises by labeling the posture "postconviction." *See Hooks*, 689 F.3d at 1183 (describing the analogy between an *Atkins* claim at first opportunity and a general right to counsel for collateral attacks as "merely superficial"); *Martinez*, 132 S. Ct. at 1317.

The State's argument that post-*Atkins* and pre-*Atkins* defendants should be treated differently is contrary to the very definition of retroactivity. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."). According to the State, an intellectually disabled person who seeks his first opportunity to effectuate this Court's retroactive ruling in *Atkins* may be forced to prove his intellectual disability without counsel and without an expert. And the resultant decision would merit AEDPA deference. To accept that argument is to render *Atkins*'s retroactivity a

nullity, and to virtually guarantee an intellectually disabled person's execution.

2. *The State Court Violated* Ford. In his opening brief, Brumfield argued that the state court's decision violated *Ford v. Wainwright*, 477 U.S. 399 (1986), because—notwithstanding Brumfield's threshold showing of intellectual disability—the state court denied him an adequate opportunity to submit expert evidence by rejecting his intellectual disability claim before ruling on his funding requests. Pet. Br. 52-55. Instead of engaging with the substance of this argument, the State contends—again, for the first time—that Brumfield's request for funding was not made with sufficient specificity. Resp. Br. 49. This argument, aside from being waived below and never raised in the State's opposition to certiorari, is belied by the State's insistence at every stage of these proceedings, and the findings of the courts below, that Brumfield's funding claim was adjudicated on the merits. *See supra* at 20.

Next, the State argues that the rule of *Ford* does not apply here because Brumfield was still at only a "threshold stage" of the proceedings. Resp. Br. 47-51. This improperly conflates the threshold showing required for due process to attach under *Ford* with the threshold showing of "objective factors" required to obtain a hearing under *State v. Williams*, 831 So. 2d 835, 857 (La. 2002). The two standards have nothing to do with one another.

Under *Ford*, where, as here, a defendant's execution "depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances,'"

Ford, 477 U.S. at 426 (citation omitted) (Powell, J., concurring), upon making a threshold showing regarding his mental condition, he is entitled to "an adequate opportunity to submit expert evidence," *Panetti v. Quarterman*, 551 U.S. 930, 951-52 (2007). Brumfield's proffer satisfied that showing. Pet. Br. 36-37, 52. The state court then violated *Ford* when it denied Brumfield's substantive claim *before* ruling on his request for funding, thereby depriving him of an opportunity to present expert evidence. *Panetti*, 551 U.S. at 951-52. It is of no moment that this violation of due process took place without Brumfield having first been provided with a hearing under *Williams*. Brumfield's constitutional right to an opportunity to submit expert evidence was independent of his right to a hearing.

The State's remaining contention—that *Ford* is too "general" to be "clearly established" beyond its specific facts, Resp. Br. 46-47, 52—has been firmly rejected by this Court in the past. *See Panetti*, 551 U.S. at 953 (that "the standard [in *Ford*] is stated in general terms does not mean the application was reasonable. . . . [E]ven a general standard may be applied in an unreasonable manner."). By unreasonably applying *Ford*, the state court violated § 2254(d)(1).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 13-1433

In The Supreme Court of the United States

KEVAN BRUMFIELD,
Petitioner,

v.

BURL CAIN, WARDEN
LOUISIANA STATE PENITENTIARY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

BRIEF AMICI CURIAE OF CHIEF JUSTICE PASCAL F. CALOGERO, JR., THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (LACDL), & THE PROMISE OF JUSTICE INITIATIVE (PJI) IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court, retired, was elected to the Louisiana Supreme Court in 1972, and sworn in as Supreme Court Chief Justice in 1990. In December of 1994, Chief Justice Calogero was appointed by U. S. Supreme Court Chief Justice William H. Rehnquist to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States, and, in 1995, he commenced serving on the National Center for State Courts Time on Appeal Advisory Committee. In 1997, he was elected to the Board of Directors of the Conference of Chief Justices. Chief Justice Calogero retired in 2008.

The *Louisiana Association of Criminal Defense Lawyers* (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL has been an instrumental partner in the bi-partisan effort to reform indigent

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[1] Pursuant to this Court's Rule 37. *Amicus* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

defense services in Louisiana. LACDL has been involved in the effort to reform indigent defense services which resulted in the creation of the Louisiana Indigent Defender Board (LIDB), its transformation into the Louisiana Indigent Defense Assistance Board (LIDAB), and the current Louisiana Public Defender Board (LPDB), on which a member of LACDL serves *ex officio*. See La. R.S. 15:146 (B) (6)(a). The mission of LACDL is to promote a fair, accurate, and humane criminal justice system through education, advocacy, and the development of effective and professional defense lawyers.

The *Promise of Justice Initiative* (PJI) is a private, non-profit organization that advocates for humane, fair, and equal treatment of individuals in the criminal justice system. PJI is located in New Orleans Louisiana. PJI was created to advocate for the constitutional commitment to decency and justice. Board members of PJI include former Chief Justice of the Louisiana Supreme Court, Chief Justice Calogero, responsible for the creation of the Louisiana Indigent Defender Board, and author of the decision in *State v. Peart*, 621 So. 780 (1993) and, now retired Honorable Judge Calvin Johnson, elected in 1990 to the Criminal District Court in Orleans Parish, the first African-American Chief Judge of that court, responsible for the ruling in the district court in *State v. Peart*, and ultimately a significant participant in the effort to transform the indigent defense system after Hurricane Katrina.

SUMMARY OF ARGUMENT

Mr. Brumfield's post-conviction case came in the *lacunae* between the system that existed prior to the closure of the federal resource center, and the system that exists today. It is unquestionable, that if tried today, or even any period after 2004, or even if had proceeded into state conviction after 2004, or even if he had been just been assigned state post-conviction counsel from a state funded office rather than reliant on pro bono counsel, he would have had access to state funded resources to prepare and present a claim of intellectual disability.

This gap in services arose during Louisiana's long struggle to fulfill its obligations to fully fund indigent defense. Amicus LACDL has been at the heart of that struggle for thirty years. Nowhere has this struggle had more consequential ramifications than in the context of Louisiana's administration of capital punishment.

While petitioner was in state post-conviction, this Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court held the execution of individuals with mental retardation to be cruel and unusual punishment, directing the states to "develop [an] appropriate way[] to enforce the constitutional restriction upon its execution of sentences" of death against intellectually disabled defendants. *Id.* at 321.

The decision in *Atkins* came in the midst of significant crisis in the funding of capital cases in Louisiana, occurring shortly after the Louisiana Legislature created a statutory requirement to provide counsel in state post-conviction, but before that obligation was fully funded. The crisis ultimately resulted in Acts 2007, No. 307, creating what is now called the Louisiana Public Defender Board (LPDB).[2]

This *Amicus Brief* provides factual background on the eighteen other defendants in Louisiana who were prosecuted prior to this Court's decision in *Atkins*, and whose claims of intellectual disability were then addressed on direct appeal or post-conviction.[3] As demonstrated below, each defendant was ultimately provided funding to

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[2] At the time that Mr. Brumfield's case proceeded through state post-conviction, the Louisiana Indigent Defense Assistance Board (LIDAB) was responsible for funding capital cases on direct appeal and in state post-conviction. As explained later, the mandate was not funded at the outset, and a number of individuals such as Mr. Brumfield had to rely on *pro bono* counsel. Mr. Brumfield was the only individual with an *Atkins* claim who did not receive funds to develop evidence supporting exemption from capital punishment due to intellectual disability.

[3] The *Amicus Brief* does not address cases that were tried after *Atkins v. Virginia*, where defendants raised the issue prior to trial, and the claim was rejected by a jury.

develop and present their *Atkins* claim in the state courts, or, as in a few cases, the evidence supporting intellectual disability was developed by the Loyola Death Penalty Resource Center, whose funding (for all expenses, including experts) was provided by the Defender Services Office of the Administrative Office of the United States Courts.

The funding that was provided to each *Atkins* claimant was secured through various state-funded capital defender offices. The funds provided compensation for the staff attorneys and for experts in the field of intellectual disability, including psychologists and investigators to specifically determine the adaptive functioning of each individual client.

LIDAB contracted with a number of organizations to provide this representation, including the Capital Appeals Project (CAP), the Louisiana Capital Assistance Center (LCAC), the Capital Post-Conviction Project of Louisiana (CPCPL), and the Baton Rouge Capital Conflicts Office (BRCCO). In April of 2003, LIDAB created a special *Atkins* fund to provide experts for cases that were either on direct appeal, or in state post-conviction and represented by CPCPL.[4] At the

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[4] The one-time allocation of funds to handle remand cases was ultimately not sufficient. After the depletion of this fund,

time this case proceeded, however, the fund was not available for individuals like Petitioner who were represented by *pro bono* counsel in state post-conviction.

In each of the described cases, it is shown that the *Atkins* claimants were provided an opportunity to present and litigate their claims *via* these offices. In Louisiana's chaotic effort to enforce the protections of *Atkins*, Petitioner Brumfield appears to be the only condemned prisoner with who did not receive state resources to develop his claim.

Additionally, this amicus brief explains the judicially- and legislatively-imposed changes in law for capital post-conviction petitioners beginning in 1999, at the close of the federally-funded death penalty resource center. As shown, those changes, including access to state public defender expert funding, provided other condemned prisoners fair and adequate opportunities to develop evidence that categorically exempted them from capital punishment.

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resources were secured through the state funded capital defender offices.

ARGUMENT

I. The Louisiana Supreme Court Adopted Basic Procedures For Handling *Atkins* in Cases on Appeal and In Post-Conviction in Louisiana Which Were Applied to Every Defendant Except Petitioner.

The handling of *Atkins* cases on appeal and in post-conviction in Louisiana has been governed by court rule. While Louisiana's legislature ultimately responded to *Atkins* by implementing a statutory provision, La. C.Cr.P. art. 905.5.1, the Court held that the Article only applies at the trial level.[5]

In response to this Court's decision in *Atkins*, the Louisiana Supreme Court adopted a procedure for handling claims of intellectual disability in cases that had been tried prior to the *Atkins* decision. The state Supreme Court held that, while

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[5] *See State v. Dunn*, 974 So. 2d 658, 662 (La. 2008), discussed *infra* ("**[W]e find that, by its terms, Article 905.5.1 does not apply to the present situation.** Because the legislature has not established a procedure to be used for Atkins hearings conducted post-trial and/or post-sentencing, the state of the law for cases in a post-verdict posture is the same as it was at the time we issued our decision in *Williams*.") (emphasis added).

the defendant does not have an "automatic right to a hearing on the issue of mental retardation," he is entitled to a hearing if there is "sufficient evidence to raise a reasonable doubt" as to the issue. *State v. Williams*, 831 So. 2d 835, 858 n.33 (La. 2002) (citation omitted). The Court made clear that this did not mean that the defendant must provide proof to prevail on the claim, but only that he must "com[e] forward with some evidence to put his mental condition at issue." *Id.*

Borrowing from Louisiana's competency to stand trial provisions, La. C.Cr.P. art. 641, et seq., *Williams* held that the "procedure will allow for court-appointed experts to examine the defendant," and cautioned that only experts "with the appropriate expertise to diagnose mental retardation" must examine the defendant, and the State and the defendant must also be given the right to independent mental examination of the defendant by experts of their choice. *Id.* at 859.

The evidentiary standard at the hearing on the issue was "the preponderance of the evidence standard." *Id.* at 859. The definition of mental retardation adopted by the court required i) evidence of significantly sub-average general intellectual functioning; ii) deficits in adaptive behavior; and iii) manifestation during the developmental period. It was consistent with the

clinical definitions quoted and adopted by the Court in *Atkins*. *See Williams*, 831 So. 2d at 852–54.[6]

II. Resolution of Other Cases Pending at the Time of *Atkins*

At the time *Atkins* was issued, there were 87 people on Louisiana's death row.[7] After *Atkins*, eighteen Louisiana death row inmates (besides Petitioner Brumfield) whose cases were on appeal or in post-conviction have brought *Atkins* claims. In every case except for the Petitioner's, the claimant appears to have had access to expert assistance and received an opportunity to be heard on the *Atkins* claim:

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[6] *Williams* cited the AAMR 10th edition's definition and specifically noted that the standard error of measurement of the individual testing instruments must be taken into account when reviewing *Atkins* claims. *Id.* at 853 n.26. Likewise, *Williams* cites to the DSM IV, *id.* at 853 n.25, which states clearly at pp. 41–42, "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75."

[7] *See* DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 26 (2002), *available at* www.naacpldf.org/files/publications/DRUSA_Summer_2002.pdf. The number listed in the document is 96 as of July 2002. Nine individuals listed in the file were in brackets, however, reflecting that they had previously had their convictions or sentence reversed.

1. Corey Williams' case was pending on direct appeal when this Court rendered the *Atkins* decision. *See Williams*, 831 So. 2d 835. The evidence introduced at his trial by his own expert was that he was not mentally retarded, despite a low IQ score, because the expert described the defendant as "street smart." *Id.* at 856. In the first post-*Atkins* appellate decision addressing intellectual disability determinations, the Louisiana Supreme Court remanded for an evidentiary hearing. *Id.* at 861. State public defender funding was ultimately available to counsel to retain appropriate experts to conduct an adaptive functioning evaluation, and administer testing. Following this assessment, an intellectual disability expert generated a report opining that the defendant was mentally retarded. The district court then appointed its own experts to assess the defendant's intellectual disability. After a four-day hearing, the district court granted relief, holding that Williams was a person with intellectual disabilities. *See State v. Williams*, 1st Judicial District Case No. 193,258-3 (Feb. 20, 2004) (unpub. order). Williams was represented on appeal by lawyers from the state-funded Capital Appeals Project (CAP) and in the trial court by the state-funded Louisiana Capital Assistance Center, with access to state funds to prepare and present his *Atkins* claim.

2. James Dunn's case was pending on direct appeal when this Court rendered the *Atkins* decision. *See State v. Dunn*, 831 So. 2d 862 (La. 2002). The evidence at trial indicated that Dunn achieved an IQ score of 71. Though an expert opined that he was mentally retarded at his pre-*Atkins* trial, the Court noted that the expert did not "adequately focus on the developmental period of Dunn's life—a critical time period for determining whether one is mentally retarded." *Id.* at 884. The Louisiana Supreme Court remanded for an evidentiary hearing. *Id.* Dunn was represented in part by CPCPL[8] on direct appeal and by the BRCCO on remand. Thus, state public defender funding was readily available to retain appropriate experts to conduct an adaptive functioning evaluation and administer testing. Following this assessment, an intellectual disability expert generated a report opining that the defendant was mentally retarded. The district court appointed its own experts to assess the defendant's intellectual disability. After a

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[8] CPCPL was created in 2001 to provide representation in post-conviction and on appeal in cases where, due to a conflict of interest, CAP was unable to represent the defendant. CAP represented Mr. Dunn's co-defendant, Anthony Scott. As such, CPCPL enrolled on behalf of Mr. Dunn prior to oral argument on direct appeal, and litigated the claim of mental retardation in the Louisiana Supreme Court.

multi-day hearing at which experts testified, the trial court denied relief. The Louisiana Supreme Court affirmed the ruling, observing: "In this instance, it is clear defendant suffers from low intellectual functioning, but, based upon all the evidence before us, we do not find defendant has met his burden to establish the trial court erred in finding he is not mentally retarded." *State v. Dunn*, 41 So. 3d 454, 473 (La. 2010).

3. Joseph Carmouche's case was pending on direct appeal at the time this Court issued the *Atkins* decision. *See State v. Carmouche*, 872 So. 2d 1020 (La. 2002). The evidence at his trial indicated that he had an IQ in the 70–80 range. After his counsel sought rehearing based upon *Atkins*, the Louisiana Supreme Court remanded the case for an *Atkins* hearing.[9] Carmouche was represented by two state-funded offices, primarily CAP[10] on direct

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[9] *See State v. Carmouche*, 872 So. 2d 1020, 1049 (La. 2002) ("On remand of this case, the district court is to consider pleadings from relator and from the state and determine whether relator has 'provided objective factors that . . . put at issue the fact of mental retardation.'") (*quoting Williams*, 831 So. 2d at 857).

[10] CAP was created in 2001, and enrolled on Mr. Carmouche's behalf after the opinion had been issued for the purpose of filing rehearing and seeking certiorari.

appeal and LCAC on remand. Thus, counsel had the necessary funding to retain appropriate experts to conduct an investigation to identify evidence of adaptive deficits. Counsel retained an expert who examined the defendant and generated a report opining that the defendant was a person with intellectual disabilities. At the scheduled hearing, the State ultimately conceded that the defendant was a person with intellectual disabilities; he now has a life sentence. *See State v. Carmouche*, 15th Judicial District Case Nos. 54,122; 54,123; 54,124 (Oct. 11, 2004) (unpub. order).

4. Anthony Scott was sentenced to death by a jury prior to this Court's opinion in *Atkins*. He raised the issue of intellectual disability for the first time on direct appeal. *See State v. Scott*, 921 So. 2d 904, 959 (La. 2006). The Court noted that "[t]he record contains several IQ tests of the defendant over his lifespan ranging near the borderline range of intellectual functioning." *Id.* The State argued that a remand was unnecessary, because the record indicated that the "defendant at one time carried a school classification as learning disabled, which excludes by its definition the possibility that defendant is also mentally retarded." *Id.* Over the State's objection, the Louisiana Supreme Court ordered a remand for an *Atkins* hearing.

Id. at 960. Scott was represented by CAP on direct appeal. LCAC represented Scott on remand with access to funding to prepare and present his *Atkins* claim. Thus, counsel had the necessary funding to retain appropriate experts to conduct an investigation to identify evidence of adaptive deficits. Counsel retained an expert who examined the defendant and generated a report opining that the defendant was a person with intellectual disabilities. The district court appointed its own experts to assess the defendant's intellectual disability. Following this assessment, an order granting *Atkins* relief was entered in 2012. *See State v. Scott*, 23rd Judicial District Case No. 98-36-E (June 26, 2012) (unpub. order).

5. Eddie Mitchell's case was in state post-conviction at the time of *Atkins*. His conviction had been upheld years earlier. *See State v. Mitchell*, 674 So. 2d 250 (La. 1996). Mitchell was represented by attorneys by a state-funded defender office, the Louisiana Capital Assistance Center, with access to funds to prepare and present his *Atkins* claim. Funded counsel retained the psychiatrist who had previously performed the initial competency hearing in the case. The psychiatrist consulted with a psychologist who performed IQ testing. While Mr. Mitchell had been diagnosed with a low IQ score prior to

trial, counsel used state funds to conduct an investigation into adaptive deficits and to determine the age of onset. After a hearing, the state post-conviction court granted *Atkins* relief. *See State v. Mitchell*, 14th Judicial District Court Case No. 92-CR-006308 (7/26/2002) (unpub. order). This ruling was upheld on writs to the Louisiana Supreme Court. *See State v. Mitchell*, 860 So. 2d 1126 (La. 2003).

6. Tyronne Lindsey was tried and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Lindsey*, 543 So. 2d 886 (La. 1989). Lindsey was initially represented by the Loyola Death Penalty Resource Center, and thus had federal funding to develop his claim of intellectual disability. Unable to secure relief in state courts prior to *Atkins*, Lindsey filed a federal habeas corpus petition. After *Atkins*, and after securing funding to conduct an investigation of adaptive functioning, the parties agreed to *Atkins* relief. The parties then filed a joint out-of-time motion for a new penalty trial in the state district court, which was granted; Lindsey now has a life sentence. *See State ex rel. Lindsey v. Cain*, 24th Judicial District Case No. 80-0220-J (Apr. 5, 2004) (unpub. order).

7. Thomas Deboue was convicted and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Deboue*, 552 So. 2d 355 (La. 1989). In state post-conviction prior to *Atkins*, Deboue's counsel, the Loyola Death Penalty Resource Center, retained experts, conducted an evaluation of adaptive functioning, and argued that his intellectual disability exempted him from capital punishment. The state post-conviction court denied relief, rejecting the contention that it was cruel and unusual punishment to execute an individual with mental retardation. Based entirely on the evidence developed prior to *Atkins* by the Resource Center,[11] a federal district court granted *Atkins* relief in federal habeas corpus proceedings. *See Deboue v. Cain*, E.D. La. 01-464 (3/10/2005), Doc. 35. The Court observed that "all of the evidence relevant to petitioner's mental retardation was collected and analyzed at a time which substantially pre-dates the issuance of the *Atkins* opinion. The undisputed fact is that petitioner fits the definition and profile of a mentally retarded person." *Id.* at 7.

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[11] The funding of the intellectual deficit investigation was supplemented by court-ordered funding. See *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287 (La. 1992).

8. Allen Robertson was sentenced to death in 1995. His conviction and death sentence were upheld. *See State v. Robertson*, 712 So. 2d 8 (La. 1998). Robertson was represented by pro bono counsel in state post-conviction proceedings, who moved the district court for funds to develop an *Atkins* claim. In support, the motion cited *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992). Following the denial of expert funding by the district court, the Louisiana Supreme Court granted writs and consolidated his case with that of Jimmy Ray Williams. *See State ex rel. Robertson v. Cain*, 872 So. 2d 1073 (La. 2004); *State ex rel. Williams v. Cain*, 872 So. 2d 1073 (La. 2004). After the court's opinion in *State ex rel. Williams v. State*, 888 So. 2d 792 (La. 2004), Robertson then received state public defender funding to more fully develop an *Atkins* claim. His amended post conviction petition alleging an *Atkins* claim was denied by the trial court. The Louisiana Supreme Court granted writs and remanded for an *Atkins* hearing. *See Robertson v. Cain*, 17 So. 3d 960 (La. 2009). Robertson is now represented by CPCPL; his claim is still pending in state court.

9. Rogers Lacaze was sentenced to death in 1995 just four and a half months after his arrest on first degree murder charges. His conviction and death sentence were upheld

prior to this Court's opinion in *Atkins*. *See State v. Lacaze*, 824 So. 2d 1063 (La. 2002). The Louisiana Supreme Court rejected his claim that the execution of individuals with intellectual disability was cruel and unusual punishment, noting however that trial counsel had not discovered until after trial that the defendant had an IQ score within the limits of intellectual disability. Lacaze is represented by CAP. Thus, public defender funding was available to counsel to develop and litigate an *Atkins* claim in post-conviction, which remains pending in state court.

10. Frederick Gradley was convicted and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Gradley*, 745 So. 2d 1160 (La. 1998). The Louisiana Supreme Court observed in upholding his sentence:

> Three psychologists testified about defendant's mental status. One opined that defendant was mildly mentally retarded with an IQ in the mid-sixties range. . . . Two other psychologists testified that defendant's IQ scores were in the borderline to low average range of 75 to 80. . Police officers that had dealt with defendant testified that he had never appeared to be

> mentally retarded in their dealings with him.

Id. at 1171. His case is funded by CPCPL; he received funding to litigate his *Atkins* claim in post-conviction, which remains pending in state court.

11. Jeremiah Manning was convicted and sentenced to death on May 7, 2002, just prior to this Court's decision in *Atkins*. *See State v. Manning*, 885 So. 2d 1044 (La. 2004). On direct appeal, the Louisiana Supreme Court rejected the defendant's request for a remand. *Id.* The Court noted that a psychologist "indicated defendant had been diagnosed as 'mildly retarded or at least slow learner level.'" *Id.* at 1107. In rebuttal, the State's psychiatrist "at the penalty phase, testified defendant's IQ was between 70 and 80" and "also stated he did not consider defendant mentally retarded, but rather that he functioned in the 'just below average' range." *Id.* The Court noted that

> In an appendix to his brief defendant has attached school records that were not submitted to the trial court. Appx., pp. 129–36. Because these reports were not submitted to the trial court, we will not consider them in our

> assessment of defendant's claim that the records support an *Atkins* remand.

Manning, 885 So. 2d at 1107 n.47. The Court affirmed his conviction and death sentence but noted that "in the event this judgment becomes final on direct review," the Clerk should "immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which . to enroll counsel to represent defendant in any state post-conviction proceedings " *Id.* at 1114. His case remains in post-conviction where he is represented by CPCPL and now has access to funding to develop and litigate an *Atkins* claim.

12. Antoine Tate was convicted and sentenced to death in February 2000. The Louisiana Supreme Court upheld his conviction and sentence after this Court's decision in *Atkins*. *See State v. Tate*, 851 So. 2d 921 (La. 2003). The Louisiana Supreme Court noted that the defense psychologist testified at trial that the defendant had borderline intellectual functioning and was not mentally retarded. *Id.* at 942. The Court affirmed his conviction and death sentence but noted that "in the event this judgment becomes final on direct review," the Clerk should "immediately notify the Louisiana Indigent Defense Assistance Board and provide

the Board with reasonable time in which . . to enroll counsel to represent defendant in any state post-conviction proceedings " *Id.* at 943. His case remains in post-conviction where he now has access to funding to develop and litigate an *Atkins* claim.

13. Willie Tart was convicted and sentenced to death prior to *Atkins*. *See State v. Tart*, 672 So. 2d 116 (La. 1996). In its proportionality review, the Louisiana Supreme Court noted that Tart failed a number of grades, and was "classified as being learning disabled but not mentally retarded." *Id.* at 134. The Court observed "[a]lthough no I.Q. was determined at this time, the state asserts in brief that earlier school testing determined Tart's I.Q. as 82. The defense does not contest this result." *Id.* Subsequently, with the assistance of state public defender funding to develop and litigate an *Atkins* claim, Tart was permitted to seek *Atkins* relief in state post-conviction. *See State ex rel. Tart v. State*, 3 So. 3d 456 (La. 2009) ("Accordingly, our denial of writs in *State ex rel. Tart v. Cain*, 02-2132 (La. 11/26/03), 860 So. 2d 1126, in which relator sought relief on the basis of the intervening decision in *Atkins v. Virginia*, 536 U.S. 304 . . without presenting the claim first to the district court does not preclude further proceedings designed to produce a definitive

answer to the question of whether relator is mentally retarded and so exempt from capital punishment. . [T]he district court is ordered to make a substantive ruling on whether relator qualifies as mentally retarded under *Atkins* and is hence ineligible for execution. . . Although the district court has already taken evidence on the *Atkins* issue, it may conduct further evidentiary proceedings as it deems necessary to address the claim fully on the merits.") (internal citations omitted). Tart is represented by CPCPL and has access to state public defender funding to litigate his *Atkins* claim in post-conviction, which remains pending in state court.

14. Cedric Edwards was convicted and sentenced to death prior to *Atkins*. *See State v. Edwards*, 750 So. 2d 893 (La. 1999). On direct appeal, during the proportionality analysis of the Court's opinion, the Court observed: "Defendant has a learning disorder but managed to complete the 10th grade. His full scale IQ is 88, in the low average range, as determined by defense psychologist Dr. Mark Vigen." *Id.* at 912–13. Following direct appeal, Edwards was represented by CPCPL, and thus had state public defender funding to develop and litigate an *Atkins* claim. In state post-conviction, the defendant asserted that he was intellectually disabled and exempt from capital

punishment. He was able to retain experts to conduct an investigation into adaptive functioning and testing. The Louisiana Supreme Court granted his writ application and remanded the case for a full hearing. *See State v. Edwards*, 841 So. 2d 768, 768–69 (La. 2003) ("For the first time in this Court, relator has raised the question of whether he is exempt from capital punishment by reason of mental retardation."). Funded counsel conducted an investigation to identify evidence of adaptive deficits, and retained experts who examined the defendant. Edwards' over-all post-conviction petition claims remains pending. However, based upon the opinions of his retained experts, the *Atkins* claim was withdrawn.

15. Michael Cooks was convicted and sentenced to death prior to *Atkins*. *See State v. Cooks*, 720 So. 2d 637 (La. 1998). The Court observed that the Uniform Capital Sentence Report and the Capital Sentence Investigation Report noted that Cooks "graduated high school in special education. Testing revealed an I.Q. of 78 . " *Id.* at 651. When Mr. Cooks' conviction and death sentence became final, the district court issued an execution warrant. On writs, the Louisiana Supreme Court stayed the execution and ordered the appointment of counsel. *See State ex rel. Cooks v. State*, 1999

La. LEXIS 3547 (La. Dec. 22, 1999) ("Relator's execution set for January 5, 2000, is stayed. This Court previously directed the district court to refer this case to the Louisiana Indigent Defense Assistance Board (LIDAB) for purposes of enrolling counsel to represent relator in post-conviction proceedings. *State v. Cooks*, 99-2541 (La. 8/25/99) 746 So. 2d 1292. The district court is directed to conduct immediately a hearing on the costs of enrolling counsel to represent relator and the source of funding for such representation, with the LIDAB present as an interested party with authority to subpoena witnesses. The district court shall take further steps as necessary to protect relator's interests, including the appointment of Neal Walker [an attorney employed by CAP] solely for purposes of representing relator at the hearing."). Ultimately CPCPL assumed the representation. Using state public defender funding, Cooks developed an *Atkins* claim. As a result of the evidence developed by post-conviction counsel, the court appointed a panel of experts who generated reports that Cooks was mentally retarded. His *Atkins* claim remains pending in state court.

16. Adam Comeaux was in post-conviction at the time this Court issued its holding in *Atkins*. *See State v. Comeaux*, 699

So. 2d 16 (La. 1997). Both parties stipulated to *Atkins* relief in 2003, after Mr. Comeaux's conviction and death sentence had already been affirmed.[12] The record in his case contained evidence that his IQ score was between 55 and 68. *See State v. Comeaux*, 699 So. 2d 16, 27–28 (La. 1997) (unpub. app.). Throughout this process, Comeaux had access to state public funding for experts.

17. Richard Hobley was tried and sentenced to death prior to this Court's opinion in *Atkins*. *See State v. Hobley*, 752 So. 2d 771 (La. 1999). Evidence of intellectual disability was raised on direct appeal chronicling pre-trial state testing showing Hobley had a 55 IQ. After the Louisiana Supreme Court reversed the death penalty on an unrelated claim, the State agreed not to seek the death penalty on retrial because of Hobley's intellectual disability. Hobley was represented by lawyers from the Loyola Death Penalty Resource Center on direct appeal, and was assisted by the CPCPL on remand post-reversal.

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[12] The Louisiana Supreme Court granted Mr. Comeaux penalty phase relief on direct appeal on an unrelated claim. *See State v. Comeaux*, 514 So. 2d 84 (La. 1987). Mr. Comeaux was again sentenced to death after his second penalty phase.

18. Herbert Welcome's conviction and death sentence were upheld in 1983. Evidence of his intellectual disability was presented at trial. *See State v. Welcome*, 458 So. 2d 1235, 1247 (La. 1983) (noting that a "psychiatrist, a witness for the defense, testified at trial that defendant had a mental age of eight years."). On rehearing addressing proportionality review, Justice Blanche, concurring, observed: "Herbert Welcome was mentally retarded. He was described by one psychiatrist as having a mental age of 8 years. The sanity commission found him to be mildly to moderately retarded." *Id.* at 1258. After the *Atkins* decision, the *Atkins* fund (identified *supra*) was used to provide counsel for the defendant. Counsel sought clemency based upon his intellectual disability and based upon *Ford v. Wainwright*. After a clemency hearing, where evidence of his intellectual disability and mental illness was not contested, Welcome's death sentence was commuted to life without the possibility of parole in 2003.

III. The Impact of the Indigent Defense Crisis on Capital Appeals and Post-Conviction

Petitioner's crime occurred the same year the Louisiana Supreme Court issued a sweeping

condemnation of Louisiana's indigent defense system, recognizing that "the provision of indigent defense services . . . is in many respects so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees " *State v. Peart*, 621 So. 2d 780, 291 (La. 1993); *see also State v. Wigley*, 624 So. 2d 425, 429 (La. 1993) (noting that "budget exigencies" had created "oppressive and abusive extension of attorneys' professional obligations" to indigent defendants).

Mr. Brumfield's conviction became final when his *Petition for Certiorari* was denied March 22, 1999, at the onset of a critical gap period, during which time Louisiana recognized the need for funding in post-conviction assistance but before that funding became readily available.

From 1988–1999, before it closed from lack of funding, the federally-funded Loyola Death Penalty Resource Center represented death-sentenced inmates after their direct appeals were affirmed. From 1999 until 2001, representation of indigent condemned prisoners was *ad hoc*, reliant on civil law firms to provide services *pro bono*. The quality of representation varied significantly.

In 1999, shortly after Brumfield's conviction became final, the Louisiana Legislature mandated that the new Louisiana Indigent Defense

Assistance Board (LIDAB) provide counsel on direct appeal and in post-conviction cases where an indigent has been sentenced to death:

> In a capital case in which the trial counsel was provided to an indigent defendant and in which the jury imposed the death penalty, the court, after imposition of the sentence of death, shall appoint the Indigent Defense Assistance Board, which shall promptly cause to have enrolled counsel to represent the defendant on direct appeal and in any state post-conviction proceedings, if appropriate.

La. R.S. 15:149.1 (Lexis 2000).[13]

The mandate came without full funding. As noted in the Louisiana Bar Journal in 2002:

> Attached to that bill was a fiscal note estimating that, in the first five years, the program would cost $1.3 million annually. Calculations were based on the number of persons on death row at the time and the number of new cases

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[13] The statute was amended and replaced in 2007 by La. R.S. 15:169.

> projected. The Legislature never funded the program, forcing LIDAB to find money within its existing $7.5 million budget to comply with the legislative mandate.[14]

In 2001, LIDAB initiated a contract with CAP to handle all direct appeals arising from convictions and with CPCPL to handle post-conviction cases. For inmates represented by those offices, funding for experts and lawyers was available. For the few who were represented by pro bono counsel, the process for securing funding and assistance remained troubled.

On December 1, 2004, in *State ex rel. Williams v. State*, the Louisiana Supreme Court identified the problem:

> This post-conviction proceeding concerns funding issues for an indigent death row inmate represented by *pro bono* counsel. Defendant argues the systematic provision of funds to some death row inmates seeking post-conviction relief

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[14] Ed Greenlee, *Feature: Justice In Louisiana: Indigent Defense: The Louisiana Indigent Defense Assistance Board*, 50 LA. B.J. 97, 101 (Aug. 2002).

> violates equal protection guarantees. Defendant's equal protection claim appears to have two facets. First he suggests that those represented by the Capital Post-Conviction Project of Louisiana (CPCPL) get more funding than he does and this fact disadvantages him. Second, he claims that the fact that he has to litigate his funding requests while those who have representation from CPCPL do not have to do so disadvantages him.

State ex rel. Williams v. State, 888 So. 2d 792, 792–93 (La. 2004). [15]

After outlining the facts contained in the record and analyzing the applicable statutes, the court determined that LIDAB was not fulfilling its obligations found in La. R.S. 15:151.2(E)(2) (repealed 2007). That statute provided in pertinent part, that LIDAB "shall also adopt rules regarding the provision of reasonably necessary services associated with the [post-conviction litigation],

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[15] The funding crisis reached a nadir during this period when even trial-level resources were insufficient. The Louisiana Supreme Court authorized district courts to stay prosecutions pending the delivery of funds. *State v. Citizen*, 898 So. 2d 325, 328 (La. 2005) (detailing the lack of funding between 2001 and 2004).

including investigative, expert, and other services." *Id.* The court stated, "[i]n reviewing the record, the arguments of both the State and the defendant, and the legislation and its history, we note there may be statutory violations in the manner in which the funding is allocated by LIDAB to indigent capital defendants in post-conviction proceedings." *State ex rel. Williams*, 888 So. 2d at 797.

The court then determined that the record needed expanding, noting: **"We are particularly interested in the question concerning LIDAB's adoption of a resolution to prohibit the provision of funds for expert witnesses to civil law firms handling capital post-conviction cases on a *pro bono* basis ."** *Id.* (emphasis added). The case was thus remanded to the trial court for further hearings.

Following this decision, LIDAB implemented a rule that set forth guidelines for providing expert and investigative resources to all death row inmates, as mandated by 15:151.2(E)(2). Thus, no further evidence was taken by the trial court. That rule allowed *pro bono* counsel representing death-sentenced inmates to have full access to state public defender funding by application to the agency.

Eventually, after nearly a decade of effort (and a hurricane of historic proportions), reformers, due to the work of LACDL together with the

Louisiana Public Defender Association, the District Attorneys Association and other organizations, in 2007 obtained a major overhaul of the system by the enactment The Public Defender Act of 2007 (Act 307).

Mr. Brumfield's post-conviction case came in the *lacunae* between the system that existed prior to the closure of the federal resource center, and the system that exists today. He is the only one of those condemned individuals with an *Atkins* claim who did not receive state public defense funding. Comparison between the handling of petitioner Brumfield's case and others shortly thereafter is illustrative. As discussed above, *State v. Corey Williams* and *State v. Joseph Carmouche* both arose shortly after the creation of the Capital Appeals Project. Both were ultimately remanded to the district court for hearings at which they were able to use their state public defender expert funds, allowing the opportunity to present evidence of mental retardation—even though in *Williams* the defense psychologist had testified at trial that the defendant was not mentally retarded, and in *Carmouche*, an IQ score of between 70 and 80 was introduced into the trial record.[16]

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[16] *State v. Carmouche*, 872 So. 2d 1020, 1043 (La. 2002) ("Dr. Larry J. Benoit evaluated the defendant's IQ and determined that it was in the borderline range of 70–80. The defendant

The *Carmouche* case is particularly salient as the defendant was initially represented by appointed counsel on direct appeal, but transferred to CAP when it was created. The Louisiana Supreme Court issued a decision on his case on May 14, 2002. CAP took over the case on rehearing, and requested the case be stayed pending the decision in *Atkins*. After this Court decided *Atkins*, CAP supplemented the application for rehearing, and the Louisiana Supreme Court granted the rehearing request and remanded the case to the district court for a hearing.

> Application for rehearing granted; case remanded. For the first time in this Court, relator has raised the question of whether he is exempt from capital punishment by reason of mental retardation. Because the issue is a matter for the district court in the first instance, and because "not everyone faced with a death penalty sentence will automatically be entitled to a post-Atkins hearing," it is not appropriate for this Court to address

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did not assert insanity as a defense, but his mental state did comprise part of the defense case in mitigation, in which Dr. Benoit testified that the defendant's intelligence range was close to mild mental retardation.").

> the merits at this time or to order an evidentiary hearing on the claim. On remand of this case, the district court is to consider pleadings from relator and from the state and determine whether relator has "provided objective factors that . . put at issue the fact of mental retardation." If relator carries his burden in that regard, and if the court finds reasonable grounds to believe that relator is mentally retarded, it shall hold a hearing at which the court will take testimony and other evidence and determine whether relator is mentally retarded and so may not be executed.

State v. Carmouche, 872 So. 2d at 1049, *on reh'g* Sept. 24, 2003 (internal citations omitted).

CAP counsel, with access to state public defender funds, was then able to fully develop an *Atkins* claim by retaining the appropriate experts to conduct an evaluation of adaptive functioning and testing. Following the proffer of the evidence in pleadings, the State agreed to relief. Thus, there was no hearing as remanded to determine whether Carmouche could cross the *Williams* threshold of putting at issue mental retardation, because he demonstrated intellectual disability using the state public defender funding for experts.

Also similar to this discussion is the case of Allen Robertson. Like Brumfield, his case was in post-conviction at the time *Atkins* was issued and he was being represented by pro bono counsel. After counsel's request for expert funding for an *Atkins* investigation was denied by the district court, the Louisiana Supreme Court granted writs (*State ex rel. Robertson v. Cain*, 872 So. 2d 1073 (La. 2004)) and consolidated his case with *State ex rel. Williams v. Cain*, 872 So. 2d 1073 (La. 2004). After the court's opinion in *Williams*, 888 So. 2d 792 (La. 2004), [17] Robertson easily secured public defender funding to develop his claim. *See supra* Part II(8). And, as stated above, Robertson's *Atkins* claim has been subjected to an evidentiary hearing, which is presently ongoing.

To be clear, Brumfield's state post conviction litigation was final on October 29, 2004. *See Brumfield v. State*, 885 So. 2d 580 (La. 2004) (denying review). He filed his federal habeas corpus petition on November 4, 2004 (the final date for filing a timely petition). The *Williams/Robertson* decision was handed down on December 1, 2004. Thus, unlike Robertson,

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[17] Following the Louisiana Supreme Court's decision, Williams received access to state public defender funding to develop his post-conviction claims. After he proffered proof, the state agreed to a settlement in his case.

Brumfield could not take advantage of the equitable change in the state public defender expert funds. Kevan Brumfield is the only person in the post-*Atkins* era in Louisiana who was not provided the tools in which to develop and present an *Atkins* claim. All others were given access to funding from state sources for appropriate expert evaluations to fairly present their claims of constitutional violations.

CONCLUSION

Amicus respectfully suggest that the judgment below should be reversed.

Respectfully submitted,

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